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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941. No. 910.

A. B. KIRSCHBAUM COMPANY, a Pennsylvania corporation,
Petitioner,

v.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE PETITIONER.

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INDEX.

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT	5
SPECIFICATION OF ERRORS TO BE URGED	8
ARGUMENT	9
I. Preliminary Statement	9
(1) The principles relied on by the Petitioner and the judicial recognition accorded them	9
(2) The constitutional doubts attending the Administrator's position	12
(3) The undesirability of extending extraordinary Federal control in the absence of a clear Congressional intent to do so	13
II. Petitioner's maintenance and service employees, being employed by the owner of a loft building whose only business is the rental, operation and maintenance of such building in Philadelphia, are not employees of an employer engaged in interstate commerce or in the production of goods therefor and consequently are not covered by the Act	16
(1) Related sections of the Act and their legislative history	17
(a) Section 2 of the Act and its legislative history	17
(b) Sections 5 and 8 of the Act and their legislative history	20
(c) Section 11 of the Act and its legislative history	25
(2) The scope of Sections 6 and 7 of the Act as established by the legislative history	28
(a) The Senate bill	31
(b) The Conference Committee bill	33
(3) Petitioner's interpretation is confirmed by administrative and constitutional considerations deemed important by Congress	39
(a) Administrative flexibility vs. blanket standards	39
(b) Congressional regard for doubts as to the extent of its power to regulate wages and hours	41
(4) Judicial authority	44

PAGE

III. Petitioner's maintenance and service employees are not engaged in the production of goods for interstate commerce within the meaning of the Act and consequently are not covered by it 49

(1) Preliminary statement; Administrator's contention 49

(2) The statutory definition of the word "produced" as contained in Section 3(j) of the Act 51

(3) Legislative history 55

(4) Judicial authority 59

(5) Conclusion 66

IV. Petitioner's elevator operators are not engaged "in commerce" 69

V. Petitioner is exempted from the wage and hour provisions of the Act as a service establishment, under Section 13(a) (2) 75

(1) The building service cases 76

(2) The language of Section 13(a) (2) 79

(3) The legislative history of Section 13(a) (2) 80

(4) Judicial authority 85

(5) Petitioner's servicing is unquestionably in intrastate commerce and the exemption should be given effect 89

VI. If the Act be held applicable to Petitioner's service and maintenance employees it would contravene the Tenth Amendment to the Constitution 94

CONCLUSION 100

TABLE OF CITATIONS.

CASES:

Abadie v. Cudahy Packing Company, 37 F. Supp. 164 (E. D. La. 1941) 48, 60, 62

Allen v. Moe, 39 F. Supp. 5 (D. Idaho N. D. 1941) 48

Apex Hosiery Company v. William Leader, 310 U. S. 469 (1940) 13, 70

Baggett v. Henry Fischer Packing Company, 37 F. Supp. 670 (W. D. Ky. 1941) 47

Baltimore & Ohio S. W. R. R. v. Burtsch, 263 U. S. 540 (1924) 74

Barfoot v. White Star Line, 170 Mich. 349, 136 N. W. 437 (1912) 88, 89

Beatty v. Foutz Tool Co., F. Supp. , 5 W. & H. Rep. (259 S. D. Cal., Mar. 23, 1942) 86

Bowie v. Gonzalez, 117 F. (2d) 11 (C. C. A. 1st, 1941) 60

Bowman v. Pace, 119 F. (2d) 858 (C. C. A. 5th, 1941) 60, 65

Boyd v. Dowell, Inc., 5 C. C. H. Labor Cases Par. 60,770 (N. M. Dist. Ct., Lea Co., Feb. 11, 1941) 49

PAGE

Boylan *v.* Liden Manufacturing Co., 4 W. & H. Rep. 158 (C. C. Mich., Ingham Co., 1941) 87

Brown *v.* Bailey, 147 S. W. (2d) 105 (Tenn. Sup. Ct., Feb. 3, 1941) 59

Brown *v.* Carter Drilling Co., 38 F. Supp. 489 (S. D. Tex., 1941) 59

Carlton *v.* London Mines and Milling Co., 4 W. & H. Rep. 561 (Colo. Dist. Ct., Sept. 8, 1941) 59, 61

Carter *v.* Carter Coal Co., 298 U. S. 238 (1936) 42

Cecil, *et al. v.* Gradison, *et al.*, 4 W. & H. Rep. 698 (Ohio Ct. App., 1st Dist., Nov. 17, 1941) printed in Petition for Certiorari, p. 53 ..... 10, 19, 45, 60, 63, 72, 77, 98

Chapman *et al. v.* Home Ice Co., — F. Supp. —, 5 W. & H. Rep. 133 (W. D. Tenn., Jan. 25, 1942) 58, 99

Chicago B. & Q. R. R. Co. *v.* Harrington, 241 U. S. 177 (1916) 71

Chicago & E. I. R. R. Co. *v.* Ind. Comm., 284 U. S. 296 (1932) 71

Chicago R. I. & P. R. R. *v.* Bond, 240 U. S. 449 (1916) 71

Cincinnati Soap Co. *v.* United States, 301 U. S. 308 (1937) 23

Collins *v.* Kidd, 38 F. Supp. 634 (E. D. Tex., 1941) 91

Commonwealth *v.* Arrott Mills Co., 145 Pa. 9 (1891) 88, 89

Consolidated Edison Company of New York, Inc. *v.* National Labor Relations Board, 305 U. S. 197 (1938) 12, 96, 97

David *v.* Boylans, 34 F. Supp. 555 (E. D. La. 1940) 60, 65

Delaware L. & W. R. R. Co. *v.* Yurkonis, 238 U. S. 439 (1915) 71

DeLima *v.* Bidwell, 182 U. S. 1 (1901) 23

Doyle *v.* Johnson Bros., 25 N. Y. Supp. (2d) 603, 28 N. Y. Supp. (2d) 452 (N. Y. City Court, Kings Co., 1941) 60

Duncan *v.* Montgomery-Ward, 42 F. Supp. 879 (S. D. Tex. 1941) 92

Elam *v.* Wolberg, 5 W. & H. Rep. 136 (Tenn. Chanc. Ct., Jan. 29, 1942) 73

Electric Bond and Share Co. *v.* Securities and Exchange Commission, 303 U. S. 419 (1938) 20

Erie R. R. *v.* Shuart, 250 U. S. 465 (1919) 74

Farr *v.* Smith Detective Agency and Night Watch Service, Inc., 38 F. Supp. 105 (N. D. Tex. 1941) 46, 60, 65

Federal Trade Commission *v.* American Tobacco Company, 264 U. S. 298 (1924) 12

Federal Trade Commission *v.* Bunte Brothers, Inc., 312 U. S. 349 (1941) 14, 70

Fleming *v.* American Stores Company, 42 F. Supp. 511 (E. D. Pa. 1941) 35

Fleming *v.* Arsenal Building Corporation, 38 F. Supp. 207 (S. D. N. Y. 1941) 73, 76, 77, 90

Fleming *v.* Arsenal Building Corporation, 125 F. (2d) 278 (C. C. A. 2d., Dec. 30, 1941) 9, 44, 48, 62, 66, 73, 77, 78, 90, 91

Fleming *v.* Atlantic Co., 40 F. Supp. 654 (N. D. Ga. 1941) 60

Fleming *v.* Goldblatt Bros., Inc., 39 F. Supp. 701 (N. D. Ill. 1941) 48

PAGE

Fleming *v.* Pearson, 39 F. Supp. 300 (E. D. Tenn. 1941) 60

Fleming *v.* Peoples Packing Co., Inc., 42 F. Supp. 868 (W. D. Okla., 1942) 99

Fleming *v.* Swift, 41 F. Supp. 825 (N. D. Ill. 1941) 60

Fleming *v.* Tidewater Optical Co., 35 F. Supp. 1015 (E. D. Va. 1940) ... 86

General Tobacco and Grocery Co. *v.* Fleming, F. (2d) , 5 W. & H. Rep. 103 (C. C. A. 6th, Feb. 5, 1942) 26, 28, 47

Gerdert *v.* Certified Poultry and Egg Co., 38 F. Supp. 964 (S. D. Fla. 1941). 48

Gibson *v.* Glasgow, 157 S. W. (2d) 814 (Tenn. Sup. Ct., Jan. 17, 1942) 73

Hall *v.* Warren-Bradshaw Drilling Co., 40 F. Supp. 272 (N. D. Tex. 1941). 48

Hargrave *et.* Mid-Continent Petroleum Corp., 36 F. Supp. 233 (E. D. Okla. 1941) 60

Harrison *v.* Kansas City Terminal Ry. Co., 36 F. Supp. 434 (W. D. Mo. 1941) 74

Hart *v.* Gregory, 16 S. E. (2d) 837 (N. C. Sup. Ct., Oct. 15, 1941) ... 59, 60, 61

Houston, East and West Texas Railway Co. *v.* United States, 234 U. S. 342 (1914) 14

Jewel Tea Co. *v.* Williams, 118 F. (2d) 202 (C. C. A. 10th, 1941) 58

Johnson *v.* Filstow, Inc., F. Supp. , 5 W. & H. Rep. 286 (S. D. Fla. Mar. 30, 1942) 11, 45, 59, 64, 72, 77

Killingbeck & Riddoch *v.* Garment Center Capital, Inc., 259 App. Div. 691, 20 N. Y. Supp. (2d) 521 (1940) 9, 45, 62-63, 72, 77

Labates *v.* Interstate Co., F. Supp. , 4 W. & H. Rep. 91 (W. D. Tenn. 1941) 87

Lefevers *v.* Gen. Export & Metal Co., 36 F. Supp. 838 (S. D. Tex. 1940) .. 60

Magann *v.* Long's Baggage Transfer Co., 39 F. Supp. 742 (W. D. Va. 1941). 74

McCulloch *v.* Maryland, 4 Wheat. 316 (1819) 53

McMillan *v.* Wilson, 4 W. & H. Rep. 409 (Minn. Dist. Ct., June 13, 1941). 60

Merryfield, *et al. v.* F. M. Hoyt Shoe Corporation, *et al.*, 41 F. Supp. 794 (D. N. H. 1941) 10, 45, 59, 60, 64, 67, 72, 77

Missouri Pacific Railroad *v.* Boone, 270 U. S. 466 (1926) 12

Mitchell *v.* N. Y. Life Ins. Co., 75 F. (2d) 107 (C. C. A. 7th, 1934) 72

Muldowney *v.* Seaberg Elevator Co., 39 F. Supp. 275 (E. D. N. Y. 1941) .. 60, 86

National Labor Relations Board *v.* Carroll, 120 F. (2d) 457 (C. C. A. 1st, 1941) 74

National Labor Relations Board *v.* Benjamin Fainblatt, *et al.*, 306 U. S. 601 (1939) 12, 97

National Labor Relations Board *v.* Jones & Laughlin Steel Corporation, 301 U. S. 1 (1937) 12, 42, 43, 95

Nebbia *v.* New York, 291 U. S. 502 (1934) 42

Overstreet *v.* North Shore Corp., F. Supp. , 4 W. & H. Rep. 628 (S. D. Fla. 1941) 59

PAGE

Pedersen *v.* J. F. Fitzgerald Construction Co., 262 App. Div. 665 (N. Y. Sup. Ct., App. Div., Nov. 12, 1941) 46, 59, 65

Pickett *v.* Union Terminal Co., 86 L. Ed. Adv. Ops. 598 (U. S. S. C. March 2, 1942) 74

Poff *v.* Washington Terminal Co., 69 F. (2d) 572 (App. D. C. 1934) 71

Porter *v.* Wilson, F. Supp. , 5 W. & H. Rep. 152 (N. D. Tex. 1942) 73

Price *v.* Forrest, 173 U. S. 410 (1899) 20

Puget Sound Stevedoring Co. *v.* State Tax Commission, 302 U. S. 90 (1937) . 74

Rauhoff *v.* Gramling, 42 F. Supp. 754 (E. D. Ark. 1941) 73

Reck *v.* Zarnocay, 4 W. & H. Rep. 305 (N. Y. Sup. Ct., N. Y. Co., 1941) . 48

Robinson *v.* B. & O. R. R. Co., 237 U. S. 84 (1915) 71

Robinson *v.* La Rue, 156 S. W. (2d) 432 (Tenn. Sup. Ct. Nov. 29, 1941) .. 60

Robinson *v.* Massachusetts Mutual Life Insurance Company, 158 S. W. (2d) 441 (Tenn. Sup. Ct., Nov. 29, 1941) Printed in Petition for certiorari, p. 58 ..... 11, 44, 60, 63, 72, 77

Rogers *v.* Glazer, 32 F. Supp. 990 (W. D. Mo. 1940) 59

Santa Cruz Packing Company *v.* National Labor Relations Board, 303 U. S. 453 (1938) 12, 13, 84, 95

Seaver *v.* Bradley, 179 Mass. 329, 60 N. E. 795 (1901) 71-72

Shanks *v.* D. L. & W. R. R. Co., 239 U. S. 556 (1916) 71

Southern R. R. Co., *v.* Taylor, 16 F. (2d) 517 (App. D. C. 1926) cert. denied 273 U. S. 767 71

Stucker *v.* Roselle, 37 F. Supp. 864 (W. D. Ky. 1941) 87

Sunshine Mining Co. *v.* Carver, 34 F. Supp. 274 (D. Idaho, 1940) 48

Super-Cold Southwest Co. *v.* McBride, 124 F. (2d) 90 (C. C. A. 5th, 1941) .. 86, 92

Sybert *v.* Bradley, F. Supp. , 4 W. & H. Rep. 630 (S. D. Ill. 1941) .. 60, 65

Tapp *v.* Price-Bass, 5 W. & H. Rep. 155 (Tenn. Chan. Ct., Feb. 1942) ... 73

The Daniel Ball, 10 Wall. 557 (1870) 74

Thompson *v.* Daugherty, 40 F. Supp. 279 (D. C. Md. 1941) 74

Union Stock Yard Co. *v.* United States, 308 U. S. 213 (1939) 74

United States *v.* American Trucking Associations, Inc., 310 U. S. 534 (1940) 25

United States *v.* F. W. Darby Lumber Co., 312 U. S. 100 (1941) 12, 94-95, 96, 98, 99

United States *v.* Delaware and Hudson Company, 213 U. S. 366 (1909) .. 12

Veazey Drug Co. *v.* Fleming, 42 F. Supp. 689 (W. D. Okla. 1941) 73, 99

Wagner *v.* United Dividend Corp., 5 W. & H. Rep. 138 (Colo. Dist. Ct., Jan. 2, 1942) 73

Warren-Bradshaw Drilling Co. *v.* Hall, 124 F. (2d) 42 (C. C. A. 5th, Dec. 9, 1941) 49

Wells Fargo *v.* Taylor, 254 U. S. 175 (1920) 71

West Coast Hotel Co. *v.* Parrish, 300 U. S. 379 (1937) 42

PAGE

White Motor Company v. Littleton, 124 F. (2d) 92 (C. C. A. 5th, 1941) . . 86
Williams v. General Mills, 39 F. Supp. 849 (N. D. Ohio 1941) 60
Williams v. Jacksonville Terminal Co., 35 F. Supp. 267 (D. C. Fla. 1940), affirmed on other grounds, 118 F. (2d) 324, affirmed by this Court Mar. 2, 1942, 86 L. Ed. Adv. Ops. 598 74
Womack v. Consolidated Timber Co., F. Supp. , 5 W. & H. Rep. 10 (D. Ore., 1941) 93
Wood v. Central Sand & Gravel Co., 33 F. Supp. 40 (W. D. Tenn. 1940) 48, 60, 86
Yazoo and M. V. R. C. Co. v. Thomas, 132 U. S. 174 (1889) 19

STATUTES:

Emergency Relief Appropriation Act, Fiscal Year 1941, Sec. 3 (c), c. 432, Public Resolution No. 88, 76th Congress 23
Fair Labor Standards Act, June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. A., Sec. 201 *et seq.* 3, 29, 64, 71, 72, 95-97
Sec. 2 . . . . . 18, 19, 20, 24
(a) 3, 17
(b) 3, 17
Sec. 3
(b) 3
(h) 4
(i) 52
(j) 50, 52, 66
Sec. 5 . . . . . 4, 20, 22, 23, 24, 30, 33, 40
(a) 20
(e) 23
Sec. 6 . . . . . 2, 4, 17, 19-24, 28, 30, 33, 37, 38-41, 66
(4) 21
Sec. 7 . . . . . 4, 17, 19, 21-24, 28, 33, 37-41, 48, 66
Sec. 8 . . . . . 3, 4, 20, 21, 22, 23, 27, 28, 30, 33
(a) 19, 20, 23, 24
Sec. 11 . . . . . 25, 26
(a) 25, 26, 30
(c) 27, 30
Sec. 13 . . . . . 4, 79
(a) (1) 80, 92
(a) (2) 2, 4, 8, 75, 76, 79, 80, 85, 90-93
Sec. 15 5
(a) (1) 94
(a) (2) 5
Sec. 16 (b) 9
Sec. 17 5

PAGE

Federal Employer's Liability Act, Apr. 22, 1908, 35 Stat. 65, 45 U. S. C. A. Sec. 51, *et seq.*, amended, Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404, 45 U. S. C. A. Sec. 51 71

Federal Trade Commission Act, July 2, 1890, 26 Stat. 209, 15 U. S. C. A. Sec. 1, *et seq.* 70

Judicial Code, Section 240 (a), as amended by Act of February 13, 1925, c. 229, 43 Stat. 936 2

Sherman Act, Sept. 26, 1914, 26 Stat. 209, 15 U. S. C. A. Sec. 41, *et seq.* ... 70

National Labor Relations Act, July 5, 1935, 49 Stat. 449, 29 U. S. C. A. Sec. 151, *et seq.* 12, 42, 43, 58, 70, 71, 96, 97

COMMITTEE REPORTS:

75th Congress, 1st Session

Sen. Rep. No. 884, Calendar No. 905 ..... 15, 31, 73, 81, 82

75th Congress, 3rd Session

Conference Report, to accompany S. 2475, H. R. Rep. No. 2738 .. 33, 36, 85

DEBATES:

75th Congress, 1st Session

81 Cong. Rec. p. 7648 ..... 31, 82, 83

75th Congress, 3rd Session

83 Cong. Rec.

pp. 7301–2 41

p. 7334 84

p. 7384 84

p. 7394 85

p. 7412 85

pp. 7437–38 84

pp. 9158–62 33

p. 9164 ..... 33, 34

pp. 9166–9175 34

p. 9166 34

p. 9167 34

p. 9168 ..... 35, 36, 55, 56

p. 9169 34

p. 9170 34

p. 9172 34

p. 9173 84

p. 9257 80

p. 9260 38-39

PAGE

DRAFT BILLS:

H. R. 7200 (original bill introduced in House) 57, 83

S. 2475 (original bill introduced in Senate) 57, 83

S. 2475 (as passed by Senate, July 31, 1937) introduced in Senate July 8, 1937, 75th Cong., 1st Session, Calendar No. 905 ..... 18, 22, 26, 28-32, 37-40, 56, 57, 83

S. 2475 (as passed by House May 24, 1938) introduced in House on April 21, 1938, 75th Cong., 3rd Session, Union Calendar No. 804 (Third House Committee Bill) 18, 22, 26, 28-30, 32, 37-40, 57, 84

HEARINGS:

Joint Hearings (June 2-22, 1937) on S. 2475 and H. R. 7200, 75th Congress, 1st Session 40, 43-44, 73, 81, 82

PUBLICATIONS OF THE ADMINISTRATOR:

Interpretative Bulletin No. 4 ..... 20, 50, 92

Interpretative Bulletin No. 5 20

Interpretative Bulletin No. 6 ..... 78, 87, 88

Release R-139 15

Brief in Circuit Court of Appeals below 23, 26, 30, 38, 50, 53, 60, 66, 69, 73, 74, 86-88, 90, 98

Brief in District Court below 19, 30, 87, 90

OTHER AUTHORITIES:

Forsythe, *Legislative History of the Fair Labor Standards Act* (1939) 6 Law & Contemp. Problems 464 40

Veblen, *The Theory of Business Enterprise* 50

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OCTOBER TERM, 1941. No. 910.

A. B. Kirschbaum Company, a Pennsylvania corporation,
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L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the District Court (R., pp. 175-180), is reported in 38 F. Supp. 204. The opinion of the Circuit Court of Appeals for the Third Circuit (R., pp. 213-23), is reported in 124 F. (2d) 567.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Third Circuit, which Petitioner seeks to have reviewed, was filed December 17, 1941 (R., p. 213).

The petition for a writ of *certiorari* was filed on January 29, 1942, and was granted on March 2, 1942 (R., p. 224).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

QUESTIONS PRESENTED.

1. Are the employees of an employer who is neither engaged in interstate commerce nor in the production of goods for interstate commerce, covered by the Fair Labor Standards Act?

2. Are the maintenance and service employees of the owner of a loft building whose only business is the rental, operation and maintenance of such building in Philadelphia, engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act, merely because some of the tenants of such building are engaged in the production of goods for interstate commerce?

3. Are the elevator operators of the owner of such a loft building directly engaged in interstate commerce?

4. Are the foregoing employees exempt from the wage and hour provisions of the Fair Labor Standards Act under Section 13 (a) (2) which exempts employees of service establishments the greater part of whose servicing is in intrastate commerce?

5. If the Fair Labor Standards Act is held applicable to the foregoing employees, does it contravene the Tenth Amendment to the Constitution?

STATUTE INVOLVED.

The statute involved, known as the Fair Labor Standards Act (hereinafter called the "Act"), approved June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. A., Sec. 201 *et seq.*, is printed in the Appendix, *infra*, pages 101-121. It became effective October 24, 1938.

Section 2 (a) states that Congress finds that "the existence, in industries engaged in [interstate] commerce[1] or in the production of goods for [interstate] commerce," of sub-standard labor conditions, causes, *inter alia*, such commerce and the instrumentalities thereof to be used to spread and perpetuate such sub-standard labor conditions among the workers of the several States.

Congress thereupon declared in Section 2 (b) of the Act that it was the intention of the Act to eliminate such conditions in such industries (*i. e.*, in industries engaged in commerce or in the production of goods therefor), through the exercise of Congressional power over interstate commerce.

Section 6 prescribes the minimum wages which must be paid by every employer covered by the Act to each of his employees who is engaged "in commerce or in the production of goods for commerce". During the first year after the effective date of the Act such wages are fixed at not less than twenty-five cents an hour; during the next six years from such date, not less than thirty cents an hour; and after the expiration of seven years from such date, not less than forty cents an hour or the rate prescribed by the Administrator of the Act in an order issued under Section 8 of the Act and applicable to the interstate industry in which the employer is engaged. In addition, Section 6 also provides that at no time after the effective date of the Act can any em-

[1] The term "commerce" is defined in Section 3 (b) of the Act to mean "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." Accordingly whenever used herein it should be given the meaning attributed to it in the Act, *viz.*, interstate or foreign commerce, unless otherwise qualified.

ployer pay his aforesaid employees less than the rate (not in excess of 40 cents an hour) which may be prescribed by the Administrator in an order issued under Section 8 for the particular interstate industry in which the employer is engaged.

Section 5 provides that the Administrator shall as soon as practicable appoint an "industry committee for each industry engaged in commerce or in the production of goods for commerce", while Section 8 provides that the Administrator shall from time to time convene the industry committee for each such industry which shall "recommend the minimum rate or rates of wages to be paid under Section 6 by employers engaged in commerce or in the production of goods for commerce" to the end that the policy of the Act may be carried out by reaching "*the objective of a universal minimum wage of forty cents an hour in each industry engaged in commerce or in the production of goods for commerce*". Section 8 further sets forth the procedure whereby the wage recommendations of the various industry committees shall become effective, while Section 3 (h) defines "industry" as a "trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed."

Section 7 prescribes maximum hours of labor in excess of which no employer covered by the Act may employ any of his employees who is engaged in commerce or in the production of goods for commerce unless the employee is paid for hours worked in excess of the stated maximum at a rate not less than one and one-half times the regular rate at which he is employed. During the first year from the effective date of the Act the maximum provided is forty-four hours per week; during the second year from such date, forty-two hours; and after the expiration of the second year from such date, forty hours.

Section 13 provides certain exemptions from the coverage of the Act, one of which (Section 13(a)(2)), is that the provisions of Section 6 relating to wages and Section

7 relating to overtime shall not apply with respect to "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * *."

Section 15 (a) (2) makes it unlawful for any person to violate any of the provisions of Sections 6 or 7; and Section 17 gives to the District Courts of the United States jurisdiction, for cause shown, to restrain violations of Section 15.

STATEMENT.

The Petitioner, A. B. Kirschbaum Company, owns a six-story loft building in Philadelphia (R., pp. 3, 175). Its sole activity is to operate the building as a landlord, leasing space therein to any person desiring it (R., p. 166). Although certain of its tenants are engaged in the production of goods for interstate commerce, Petitioner does no manufacturing whatsoever (R., p. 21), and has no interest in the manufacturing or other activities of any of its tenants (R., pp. 166-167, 175). In fact the Petitioner has no business or source of revenue other than that which is connected with its ownership and leasing of its building (R., p. 176).

In operating the building, it employs a cashier who is also bookkeeper (R., pp. 15-16), and a superintendent who is also chief engineer (R., p. 73), neither of whom are involved in this proceeding (R., p. 175). In addition it employs a staff of building service employees consisting of three elevator operators, two watchmen, three firemen, one engineer, a carpenter and a carpenter's helper, and a porter or cleaner (R., p. 175).

The elevator operators carry both passengers and freight in varying ratios between the several floors of the building. The watchmen pass through the building, closing windows, putting out lights, guarding against fires, etc. The engineer supervises the operation of the boilers which produce steam to operate the various pumps in the

building; to heat the building; to operate the generator which generates direct electric current used to light the portions of the building used in common by all tenants and which is also used by two of the tenants; and it is also used by some of the tenants in their manufacturing operations. In addition the engineer keeps the elevators in proper working order and takes care of the sprinkler tank. The firemen fire the boilers and occasionally supervise the running of the pumps when the engineer is called to another part of the building. The carpenter replaces sash chains, repairs the doors of the building and paints the common hallways, staircases, etc. (R., pp. 175-176).

In general it may be said that the Petitioner through the above listed employees, heats the building, keeps it in repair, furnishes steam and direct electric current to those of its tenants who desire it, cleans those portions of the building which are not leased, and provides means of ingress and egress for its tenants, their employees and property being shipped to and by them.

None of the Petitioner's employees produce, manufactures, handles, processes, or in any other manner works on or touches for the purpose of production any goods produced by any of the tenants. The goods transported in the elevators operated by certain of said employees are always in the custody of the representatives of the tenants, or their employees, or of employees of persons whom the tenants have engaged to transport the goods, or of the employees of carriers from whom they are receiving goods (R., pp. 37, 47, 56, 57, 83, 85, 99, 100, 109, 110, 115, 120, 121, 129, 135, 138, 149, 158, 159, 163).

On March 14, 1940, Philip B. Fleming, as the then Administrator of the Wage and Hour Division, United States Department of Labor, contending that all of the foregoing building service employees of the Petitioner are covered by the Act, filed his complaint, and thereafter on April 19, 1940, filed his amended complaint (R., pp. 3-7), alleging that the Petitioner had violated the Act in that it had not paid its employees the minimum

wages provided for, in Section 6, and had worked them in excess of the hours provided in Section 7 without the payment of overtime as therein provided, and prayed for an injunction restraining future violations. The basis of the Administrator's contention was that since the Petitioner's employees were engaged in the servicing and maintenance of a building, space in which was rented to tenants engaged in the production of goods for interstate commerce, such employees were themselves engaged in the production of goods for interstate commerce and thus covered by the Act in view of the provisions of Section (3) (j) which provides that an employee shall be deemed to have engaged in the production of goods for interstate commerce if he was employed "in any process or occupation necessary to the production thereof." In addition the Administrator asserted that the Petitioner's elevator operators were also directly engaged in interstate commerce.

On April 26, 1940, the Petitioner filed its Answer wherein it admitted that it did not conform to the requirements of Sections 6 and 7 of the Act with respect to certain of its aforesaid employees (Answer, pars. VII, VIII, R., p. 12), but asserted *inter alia*, first, that its employees did not come within the provisions of the Act; second, that in any event they were specifically exempt under the provisions of Section 13 thereof; and third, that the Act could not constitutionally be applied to them (R., pp. 13, 14).

After trial, the District Court, in an opinion by Kirkpatrick, *J.*, filed April 2, 1941, granted judgment for the Administrator (R., pp. 175-180), which judgment was entered on April 28, 1941 (R., pp. 180-182).

On the same day the Petitioner filed its notice of appeal to the Circuit Court of Appeals for the Third Circuit, together with bond for costs sur appeal. At the same time the District Court, on motion of the Petitioner, entered its order suspending the injunction pending appeal (R., p. 185).

After argument on appeal, the Circuit Court, in an opinion filed December 17, 1941, affirmed the judgment of the District Court (R., pp. 213-23).

On or about December 12, 1941, Philip B. Fleming resigned from the Office of Administrator of the Wage and Hour Division, United States Department of Labor, and on March 7, 1942, L. Metcalfe Walling took the oath of office as and assumed the duties of such Administrator following confirmation by the Senate of the United States of his nomination for such office by the President.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals for the Third Circuit erred—

(1) In holding that the Act covers employees of an employer who is engaged neither in interstate commerce nor in the production of goods for such commerce.

(2) In holding that the building service employees of the Petitioner are engaged in the production of goods for interstate commerce within the meaning of the Act.

(3) In holding that the elevator operators of the Petitioner are directly engaged in interstate commerce.

(4) In holding that the building service employees of the Petitioner are not exempt from the wage and hour provisions of the Act by Section 13 (a) (2), which exempts employees of service establishments the greater part of whose servicing is in intrastate commerce.

(5) In holding that the Act, when applied to the building service employees of the Petitioner, does not violate the Tenth Amendment to the Constitution of the United States.

(6) In holding that the building service employees of the Petitioner are covered by the Act and in affirming the judgment of the District Court enjoining the Petitioner from violations of the Act.

ARGUMENT.

I

PRELIMINARY STATEMENT.

(1) The principles relied on by the Petitioner and the judicial recognition accorded them.

The record in this case clearly establishes that the *employer* is engaged, *not* in interstate commerce nor in production therefor, but solely in the operation of a loft building in Philadelphia, leasing space to any person desiring it, and that its *employees*, collectively considered, maintain and operate the building for it as a going concern.[1] That Congress never intended, in passing the Act, to regulate the wages and hours of employees rendering services of that type to such a wholly local and intrastate enterprise is supported by all of the decisions on the question, with the exception of the decision in the present case and that in *Fleming* v. *Arsenal Building Corporation*,[2] which is also now before this Court for review.

The question of the application of the Act under these circumstances was first decided in 1940 by the Supreme Court of New York, Appellate Division,[3] in *Killingbeck & Riddoch* v. *Garment Center Capital, Inc.*, 259 App. Div. 691, 20 N. Y. Supp. (2d) 521. There suit was brought by a watchman and a carpenter formerly employed by the

[1] The District Court in its opinion stated: "It may be conceded that renting buildings—the industry in which this employer is engaged—is not an 'industry engaged in commerce or in the production of goods for commerce'" (R., p. 178).

[2] 125 F. (2d) 278 (C. C. A. 3d., Dec. 30, 1941).

[3] The question arises not only in actions instituted by the Wage and Hour Division of the Department of Labor for enforcement of the Act, as in the present case, but also in suits by employees claiming that they are entitled to the compensation provided for in the Act. Section 16 (b) thereof gives employees a right of action for the amount of their unpaid minimum wages and overtime compensation and an additional amount as liquidated damages, which action may be brought "in any court of competent jurisdiction." Many of the cases hereinafter referred to have therefore been decided by state courts.

defendant, the operator of a loft building, space in which was leased to tenants engaged in the production of goods for interstate commerce, to recover overtime payments and liquidated damages to which plaintiffs claimed to be entitled under the Act by reason of the fact that as employees of such building they were performing services "necessary to the production" by the tenants of goods for interstate commerce. The facts with reference to the activities of the employees in question, the nature of the business conducted by the tenants, and the relation of the employees to the tenants, were substantially the same as those involved in the present case. The contention of the plaintiffs that the coverage of the Act extended to them was rejected and judgment entered in favor of the building owner.

Again in *Merryfield, et al.* v. *F. M. Hoyt Shoe Corporation, et al.*, 41 F. Supp. 794, decided by the United States District Court for the District of New Hampshire on November 6, 1941, suit was instituted by building service employees against the Shoe Corporation and the Reconstruction Finance Corporation as the owners of a loft building in which they had been employed, to recover the compensation to which they claimed they were entitled under the Act. The Shoe Corporation had formerly been engaged in manufacturing, but in 1936 it ceased such activity and rented its factory buildings to other companies in no way connected with it, which companies as tenants engaged in the production of goods for interstate commerce. The Reconstruction Finance Corporation thereafter foreclosed the mortgage on the factory buildings and continued to rent and operate them in the same manner as theretofore. This suit was likewise dismissed on the ground that the plaintiffs were not covered by the Act.

Cecil, et al. v. *Gradison, et al.*,[4] decided by the Court

[4] So far as we have been able to determine the decision has not as yet been officially reported. However, a complete copy of the opinion is printed in the Appendix to the Petitioner's Petition for Writ of Certiorari, pp. 53-58, and it also appears in 4 W. & H. Rep. 698.

of Appeals for the First Appellate District of Ohio on November 17, 1941, was an action begun by building service employees employed in a building owned by the defendants and in part of which they conducted a banking business. The plaintiffs handled shipments of various kinds and descriptions to persons in other states and acted as freight and passenger elevator operators, janitor and engineer. Here again the plaintiffs sued on the theory that they were covered by the Act and entitled to overtime compensation under the provisions thereof. But the action of the trial court in sustaining a demurrer to their petition was sustained.

In *Robinson* v. *Massachusetts Mutual Life Insurance Company*,[5] 158 S. W. (2d) 441, decided by the Supreme Court of Tennessee on November 29, 1941, suit was brought by building service employees employed by defendant as the owner and operator of three office buildings, ninety per cent. of the space in which was leased to the Tennessee Valley Authority, to recover the compensation alleged to be due them under the Act. The judgment of the lower Court in favor of the building owner and operator was affirmed by the State Supreme Court.

The most recent case on the question, which is in complete accord with the foregoing decisions, is that of *Johnson* v. *Filstow, Inc.*,[6] where suit brought against a landlord by a janitor employed in a building leased in part to interstate tenants, was dismissed.

The above cases, representing the majority view (and that asserted by the Petitioner), have been decided in every instance by the application of one or both of two basic principles: the first, that the Act does not apply to employees of an employer who is himself neither engaged in interstate commerce nor in the production of goods therefor; and the second, that building service employees are not engaged in the production of goods for interstate commerce within the meaning of the Act since their services do not directly contribute to such production.

[5] A complete copy of the opinion is printed in the Appendix to Petitioner's Petition for Writ of Certiorari, pp. 58-65, and it also appears in 4 W. & H. Rep. 725.

[6] 5 W. & H. Rep. 286, decided by the United States District Court for the Southern District of Florida on March 30, 1942.

In the discussion that follows it will be shown that the provisions of the Act itself as well as its legislative history requires the recognition of *both* those basic principles, either of which is sufficient to exclude the Petitioner from the scope of the Act. Even in the absence of such specific evidence that the foregoing principles are conclusions required by the language of the Act and its legislative history, there is compelling reason to avoid the broad construction of the Act advocated by the Administrator.

(2) The constitutional doubts attending the Administrator's position.

In the first place, the application of the Act to Petitioner's employees would go beyond the limits of Congressional power under the commerce clause. And where a statute is open to two constructions, one of which would raise a grave and doubtful constitutional question, the construction avoiding such question will be adopted.[1]

The precise limits of Congressional power under the commerce clause can of course only be determined by this Court as each doubtful case arises. But, as we shall show in more detail hereafter, the cases decided by this Court that have gone farthest in sustaining Congressional power have dealt with activities far more intimately related to interstate commerce itself than those of Petitioner's employees. *Cf., United States* v. *Darby Lumber Co.*, 312 U. S. 100 (1941), sustaining the Act as applied to the facts there presented; and cases approving particular applications of the National Labor Relations Act: *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1 (1937); *Santa Cruz Packing Company* v. *National Labor Relations Board*, 303 U. S. 453 (1938); *Consolidated Edison Company of New York, Inc., et al.*, v. *National Labor Relations Board*, 305 U. S. 197 (1938); and *National Labor Relations Board* v. *Benjamin Fainblatt, et al.*, 306 U. S. 601 (1939).

[1] *Missouri Pacific Railroad* v. *Boone*, 270 U. S. 466, 472 (1926); *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298, 307 (1924); *United States* v. *Delaware and Hudson Company*, 213 U. S. 366, 408 (1909).

In all those cases this Court emphasized the necessity that the activity in question must have a "close and substantial" effect upon interstate commerce in order to bring it within Congressional power. Conversely, as this Court stated in the *Santa Cruz* case,[2] the "subject of federal power, is still 'commerce'." Congress may do what is "necessary and proper" to regulate commerce, but there is no justification for substituting the word "production" for the word "commerce" in the constitutional phrase.

(3) The undesirability of extending extraordinary Federal control in the absence of a clear Congressional intent to do so.

In the second place, even where Congressional power is reasonably clear this Court has refused to interpret federal statutes in such a way as to exhaust Congress' constitutional power in the absence of a clearly expressed intent to that effect. Congress may of course regulate interstate commerce. And where "necessary and proper" to the full and successful regulation of such commerce, Congress has been permitted to regulate activities which, considered separately, would be considered intrastate and not to come within the federal power.

To exercise this extraordinary power however, Congress must speak clearly. It seems true that recent decisions of this Court have permitted Congress greater latitude than formerly in the exercise of its power to regulate interstate commerce. But as a corollary to this wider power has come a new responsibility, the responsibility of stating when it wishes to use this wider power. The control of local activities by the Federal government is a delicate matter and the intention to exercise it will not lightly be imputed to Congress. In *Apex Hosiery Company* v. *William Leader*, 310 U. S. 469 (1940), this Court stated (p. 513):

[2] 303 U. S. 453, 466-67 (1938).

"The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress."

Likewise, in *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349 (1941), an attempt was made to apply the doctrine of the *Shreveport* case[1] to justify orders issued by the Federal Trade Commission against persons whose activities unquestionably "affected" interstate commerce in the constitutional sense. Petitioner regards as significant the language of the Court in restraining such an attempt:

"When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly. See, for example, National Labor Relations Act • • • Bituminous Coal Act • • • Federal Employers' Liability Act • • • as amended • • •.

"The construction • • • urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law. • • • An inroad upon local conditions and local standards of such far reaching importance as is involved here, ought to await a clearer mandate from Congress." (312 U. S. at p. 351 and pp. 354-355.)

The Act here in question presents an even stronger case for the application of the doctrine of the *Bunte* decision. For here, as will be shown, the final draft of the Act

[1] *Houston, East and West Texas Railway Co.* v. *United States*, 234 U. S. 342 (1914).

was chosen in preference to earlier drafts which had provided for coverage of activity that should be found to *affect* employment conditions in interstate occupations.

One last general observation should be made. The Administrator and some lower courts believe that an abnormally broad construction of the Act is justified because the Act is "remedial" or "humane" in purpose.

But the issue is not one of humanity versus inhumanity, nor of wage-hour standards versus no wage-hour standards. Such protective legislation is a matter to which the states have long been attentive. They have in fact shown the way to the Federal government. Federal intercession was considered necessary in the realm of industries selling in and producing for interstate commerce, as to which individual states would be unable effectively to deal. The true issue then is whether wage and hour standards will be regulated by Federal and state governments, each covering its normal sphere, or whether the Federal government shall be deemed to have taken to itself an exceptionally broad and questionable sphere of control.

From start to finish the record of the deliberations of Congress over the Fair Labor Standards Act evidences a desire not to extend Federal control over those matters to which the President, in his message to Congress, which initiated consideration of wage and hour legislation in interstate industry,[2] referred as being essentially and primarily the responsibility of the states and with which "the State may effectively deal without fear of unneighborly competition from sister States."

The first Administrator of the Act, who was thoroughly familiar with Congressional intention, recognized this when he made the following statement:[3]

[2] See President's message to Congress quoted in the Report of the Senate Committee on Education and Labor to accompany S. 247, 75th Cong., 1st Sess., Senate Cal. No. 905, Report No. 884.

[3] Wage and Hour Administrator's Release R-139, statement made Dec. 29, 1938, only six months after the passage of the Act.

"The area of Federal regulation is necessarily limited to employments which have some demonstrated connection with interstate commerce."

"Moreover, the Fair Labor Standards Act as it now stands uses sparingly the commerce power of the federal government. Its provisions are applicable only to employees engaged in interstate commerce or in the production of goods for interstate commerce. This use of the commerce power may be contrasted with that employed by the National Labor Relations Act, where all productive activities *affecting* interstate commerce are brought within the statute." (Italics supplied.)

II

PETITIONER'S MAINTENANCE AND SERVICE EMPLOYEES, BEING EMPLOYED BY THE OWNER OF A LOFT BUILDING WHOSE ONLY BUSINESS IS THE RENTAL, OPERATION AND MAINTENANCE OF SUCH BUILDING IN PHILADELPHIA, ARE NOT EMPLOYEES OF AN EMPLOYER ENGAGED IN INTERSTATE COMMERCE OR IN THE PRODUCTION OF GOODS THEREFOR AND CONSEQUENTLY ARE NOT COVERED BY THE ACT.

The Act and its legislative history clearly establish that Congress intended the Act to apply only within the broad framework of industries engaged in interstate commerce or in the production of tangible, physical goods for such commerce. Before an employee can be brought within the scope of the Act, therefore, it must appear, first, that his employer is engaged in interstate commerce or in the production of goods therefor in an industry so engaged, and, second, that the employee is individually engaged in such activity. Concededly Congress was con-

cerned with the interstate character of the activities of the individual employee so that, depending upon the circumstances in each case, one employee of an employer might be covered by the Act and another not. But it is equally evident that Congress intended that the employer of such employee must also either be engaged in interstate commerce or in the production of goods therefor.

Application of this criterion to the employees of the Petitioner excludes each of them from the coverage of the Act regardless of whether the particular employee considered is engaged in operating elevators, acting as a watchman, or generating steam in the boiler room. For this reason the Administrator's case must fail.

The existence of the initial requirement that the Act may be applied to a particular employee only if his employer is engaged in what may be termed an "interstate industry" is revealed by an examination of the language of related sections of the Act and their legislative history; of the legislative history of Sections 6 and 7; and of the legislative history of the Act as a whole.

(1) Related Sections of the Act and their legislative history.

(a) *Section 2 of the Act and its legislative history.*

Section 2(a) of the Act provides that:

> "Congress hereby finds that the existence, *in industries* engaged in [interstate] commerce or in the production of goods for [interstate] commerce, of [substandard] labor conditions • • •" (Italics supplied)

has adverse effects upon interstate commerce.

Section 2(b) states:

> "It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the

conditions above referred to in *such industries* • • •." (Italics supplied.)

It is noteworthy that Section 2 did not appear in the Act unchanged from the language employed in the House and Senate bills, but rather that as it now stands it represents a conscious change by the Conference Committee from the word *occupations* employed in both the predecessor bills to the word *industries* as contained in the Act. Thus the Senate Bill, passed by the Senate on July 31, 1937,[1] declared in that section corresponding to Section 2 of the Act that:

> "The employment of workers under sub-standard labor conditions in *occupations* in interstate commerce, in the production of goods for interstate commerce, or otherwise directly affecting interstate commerce" (Italics supplied)

has adverse effects upon interstate commerce the elimination of which "in occupations in and directly affecting interstate commerce" required Congressional action. Likewise, the Third House Committee Bill, passed by the House on May 24, 1938,[2] contained a finding and declaration of policy almost identical with that contained in the Senate Bill. Nevertheless, in this respect in which the two bills agreed, the Conference Committee Bill, which finally became law, changed the language of the previous sections from a declaration that sub-standard labor conditions should be eliminated from *occupations* in interstate commerce to a similar declaration with regard to *industries* engaged in such commerce or in the production of goods therefor.

[1] S. 2475, 75th Cong., 1st Sess., Calendar No. 905, reported by the Senate Committee on Education and Labor, introduced in the Senate July 8, 1937, and amended from the floor.

[2] S. 2475, 75th Cong., 3rd Sess., Union Calendar No. 804, reported by the House Committee on Labor, introduced in the House on April 21, 1938, and amended from the floor.

Respondent has seized upon Section 6 of the Act, which prescribes the minimum wages to be paid by "every employer" to those of his employees engaged in interstate commerce or production of goods therefor, and Section 7, which provides that "no employer" shall employ any such employees longer than a certain number of hours per week without overtime compensation, as indicating that Congress did not intend to provide the framework of interstate industries as the ultimate basis of coverage under the Act. This interpretation has likewise been adopted by the Circuit Court of Appeals in its opinion in the instant case. But it is clear that the general language with regard to employers in those Sections must be viewed initially against the proper background which Congress laid down in Section 2, and when this is done it results that the employers referred to in those sections are in fact those engaged in interstate industries. Such a construction was adopted in the case of *Cecil* v. *Gradison, supra,* where the Court stated:

> "Accordingly, the language of Section 206, 29 U. S. C. A., that 'Every employer shall pay to each of his employees engaged in commerce or in the production of goods for commerce wages at the following rates' and the provision in Section 207 that 'No employer shall—employ any of his employees who is engaged in commerce or in the production of goods for commerce' must be limited by the declared purpose in Section 202 and the definition of terms in Section 203 * * *."[3]

[3] In his Reply Brief in the District Court (p. 2), the Administrator asserted that resort by the Petitioner to Section 2 to show the objectives of the Act in an effort to explain the application of Sections 6 and 7, indicated a weakness of Petitioner's contention and in that connection the Administrator cited *Yazoo and M. V. R. C. Co.* v. *Thomas,* 132 U. S. 174, 188 (1889), as authority for the principle that the necessity of resorting to the preamble of an act to assist in determining the true intent and meaning of the legislature is in itself fatal to the claim set up. Although, as is shown in this Brief, the Petitioner refers to Section 2 merely as indicating the objective of the Act *as it is specifically declared and stated in Section 8 (a),* it seems

(b) *Sections 5 and 8 of the Act and their legislative history.*

In addition to thus indicating in Section 2 that the exercise of its power was to be directed only to the correction and elimination of sub-standard labor conditions "*in industries engaged in commerce or in the production of goods for commerce,*" Congress explicitly stated in Section 8 (a) that the objective of the Act was the attainment of a universal minimum wage of forty cents an hour "*in each industry engaged in commerce or in the production of goods for commerce.*" And in order to carry out such objective "as rapidly as is economically feasible without substantially curtailing employment," Section 8 (a) further provides that the Administrator shall convene "*for each such industry*" the industry committee the appointment of which is provided for in Section 5. The function of the industry committees is to recommend "the minimum rate or rates of wages to be paid under section 6 *by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.*"

Thus Section 5(a) provides that:

> "The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in [interstate] commerce or in the production of goods for [interstate] commerce,"

while Section 8(a) states:

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appropriate to note that this Court, not only in the cited case but in subsequent cases including *Price* v. *Forrest*, 173 U. S. 410 (1899), stated that the preamble may properly be referred to to assist in ascertaining the intent and meaning of a statute susceptible of different constructions. *Cf., Electric Bond and Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419 (1938).

In this connection it might not be amiss to note that the Administrator himself in Interpretative Bulletin No. 1, issued September 22, 1938, and in Interpretative Bulletin No. 5, reissued in revised form November 27, 1939 (W. & H. Manual, 1941 Edition, pp. 27, 32), refers to Section 2 of the Act to assist in ascertaining the intent of Congress.

> "With a view of carrying out the policy of this Act by reaching as rapidly as is economically feasible without substantially curtailing employment, the objective of a minimum wage of 40 cents an hour in each industry engaged in [interstate] commerce or in the production of goods for [interstate] commerce, the Administrator shall from time to time convene the industry committee for each such industry and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under Section 6 by employers engaged in [interstate] commerce or in the production of goods for [interstate] commerce in such industry or classification therein."

That the scope of these Sections and of Sections 6 and 7 is identical is shown by the fact that each pair of Sections is internally linked by cross references to the other in such a way as to leave no doubt of the intention that they should function as a unit in fixing minimum wages. Thus Section 6, setting forth certain specified minimum wages to be paid by "every employer," provides in sub-section (4) that notwithstanding the minima previously stated, *every employer* must pay:

> "(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, * * *."

And in the same way Section 8 provides that the industry committees shall recommend minimum rates to be paid *under Section 6* by employers engaged in interstate commerce or in the production of goods therefor. This in itself constitutes a direct statement by Congress of the type of employer intended by it to fall within the scope of Sections 6 and 7.[4]

[4] Since Sections 6 and 7 employ an identity of language with regard to employers, their scope is obviously identical and coverage under them must be the same.

Further evidence that Sections 5 and 8 are co-extensive with Sections 6 and 7 lies in the histories of the respective Sections. The bill which passed the Senate on July 31, 1937,[5] in recognition of the existence of geographical and economic diversities throughout the country, did not set up specific statutory minimum wages or maximum hours, but instead provided for the creation of a Labor Standards Board which was directed to declare minimum wages and maximum work weeks for "occupations" after considering various relevant factors.

On the other hand, the Bill which passed the House on May 24, 1938,[6] stipulated a single inflexible minimum wage and maximum work week so that no such intermediate body was necessary.

The Conference Committee Bill compromised between the approach of the House and that of the Senate. The rigid minimum of wages and hours of the House Bill was retained in a milder form in Sections 6 and 7 of the Act, so that over a number of years the desirable ultimate minimum standards would be achieved by a series of specified gradual increases. At the same time it was believed that certain industries would be able to progress more quickly toward the desired goal than others and would therefore be able to contribute more effectively to the raising of minimum standards without substantially curtailing employment. For this reason Sections 5 and 8 were inserted, obviously drawn from the flexible wage provisions of the Senate Bill, in order to provide for every industry a machinery whereby such variations might take place upon the recommendation of industry committees performing a function similar to the Senate's Labor Standards Board and Advisory Committees. Since

[5] S. 2475, 75th Cong., 1st Sess., Calendar No. 905, reported by the Senate Committee on Education and Labor, introduced in the Senate July 8, 1937, and amended from the floor.

[6] S. 2475, 75th Cong., 3rd Sess., Union Calendar No. 804, reported by the House Committee on Labor, introduced in the House on April 21, 1938, and amended from the floor.

both sets of Sections were intended as methods of solving the same problem and were created to function side by side at the same time, the only reasonable conclusion, in the absence of specific evidence to the contrary, is that they were given the same scope within which to operate.

No such contrary evidence has been produced on behalf of the Administrator. His argument, aside from an attempt to dismiss Sections 5 and 8 as not being "substantive" (evidently because they provide for the utilization of administrative procedure), is based solely[7] upon a misstatement of the purpose of the Act. The objective of the Act is not as the Administrator contends,[8] "the establishment of a forty cent minimum wage rate for each employee" engaged in commerce or in the production of goods for commerce, but the establishment "of a universal minimum wage of forty cents an hour *in each*

[7] That is, except for the Administrator's argument (which the District Court and Circuit Court of Appeals have properly ignored), based upon the amendment of Section 5 of the Act almost exactly two years after passage of the Act, by which sub-section (e) was added thereto. (Emergency Relief Appropriation Act, Fiscal Year 1941, Sec. 3 (c), c. 432, Public Resolution No. 88, 76th Congress.) This sub-section provides for the appointment of an industry committee for Puerto Rico and the Virgin Islands, "to recommend the minimum rate or rates of wages to be paid under Section 6 to all employees * * * engaged in commerce or in the production of goods for commerce * * *." In legislating with respect to the territories, possessions and dependencies of the United States, Congress is, of course, not subject to the same restrictions that are imposed upon it with regard to laws for the United States considered as a political body of states in union. *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 323 (1927); *DeLima* v. *Bidwell*, 182 U. S. 1, 196 (1901). Furthermore, it is difficult to see how action by Congress two years after the passage of the Act itself (and in a minor, undiscussed amendment tacked on to an appropriation bill), can overcome explicit evidence of intent at the time of passage of the Act. Far from strengthening his case, the Administrator's resort to this sub-section demonstrates the inconsistency and weakness of his position. On the one hand he argues that Sections 5 and 8 (a), expressly applying only to interstate industry, cannot properly be viewed as indicating the scope of Sections 6 and 7; yet at the same time he attempts to show that because Section 5 (e) is not limited to interstate industries, it must follow that Sections 6 and 7 are likewise not so limited.

[8] Brief of the Administrator in the Circuit Court of Appeals at page 30.

industry engaged in commerce or in the production of goods for commerce.'"[9] (Italics supplied.)

Not only has the Administrator failed to introduce any evidence to overcome the evidence already set forth that Sections 6 and 7 have the same scope as Sections 5 and 8. But there is also in the legislative history of Sections 6 and 7 and of the Act as a whole additional and, we believe, compelling evidence that these sections were coordinate in scope and operation, as will hereafter be shown.[10]

The Circuit Court of Appeals has stated in substance in its opinion that the language of Sections 6 and 7 is clear and that nothing in Sections 2, 5 and 8 of the Act justifies the conclusion that Congress meant anything other than what literally appears in Sections 6 and 7 with regard to employers. But its statements on this point are confined entirely to a mere rephrasing and summarizing of the language which already appears in Sections 2, 5, 6, 7 and 8, and set forth no analysis or reasons as the basis of its conclusion. A reading of the full opinion can leave no doubt that the motivating factor for these statements is that Sections 6 and 7 lack on their face words specifying a particular type or types of employers. This construction ignores, however, the change in Section 2 by the Conference Committee to express the intent of Congress that the Act apply on an industry basis; the internal cross-references inserted in Sections 6 and 8; and the reasons for the insertion of Sections 5 and 8.

The result reached by ignoring these factors is unreasonable and at variance with the policy of the legislation viewed as a whole. The policy of the Act is plainly stated in Sections 2 and 8, and to give to a few words of general connotation appearing therein a construction which is broader than that policy constitutes both a

[9] Section 8 (a) of the Act.

[10] Brief, pp. 28-44, *infra*.

refusal to follow the course indicated by this Court and a settled canon of statutory construction. As this Court has stated in *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 543-544, 60 S. Ct. 1059 (1940):

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."

(c) *Section 11 of the Act and its legislative history.*

Still further evidence that the Act was intended by Congress to apply only within the framework of interstate industries is supplied by Section 11. Thus Section 11(a) provides that:

> "The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment *in any industry subject to this Act*, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. * * *." (Italics supplied.)

The genesis of this section is found in the House Bill, which the Administrator has admitted predicated coverage upon the nature of the *employer's* business.[11] Section 9(a) of that bill authorized the Secretary of Labor, in determining whether there had been any violation thereof, to investigate practices of employment "in any *industry* subject to this Act." The Senate bill, on the other hand, authorized the Labor Standards Board therein provided for to investigate practices of employment "in any *occupation* subject to this Act,"[12] in order to determine the existence of violations of the bill. It can only be concluded that the Conference Committee, when it incorporated the House bill version of this section almost verbatim as Section 11 of the Conference Committee bill, intended to make the Conference bill, which became the Act without change, applicable only to employers in interstate industry. There can be no doubt that the enforcement provisions of the Act had of necessity to be as broad in their coverage as the scope of the substantive provisions. Otherwise Congress would be deliberately passing a statute in which the means of enforcement were made incomplete and ineffective by its own action.

Section 11(a) of the Act has, since the argument of the present case in the Circuit Court of Appeals, been judicially construed to refer throughout only to employers engaged in interstate commerce or in the production of goods therefor. Thus, in *General Tobacco and Grocery Co.* v. *Fleming*, F. (2d) , (C. C. A. 6th, Feb. 5, 1942),[13] the Administrator contended that, while the words "industry subject to this Act" appeared in the first part of the sub-section, there was no such limitation in the second clause dealing with inspections

[11] Administrator's Brief in the Circuit Court of Appeals, at page 33.

[12] Sec. 12(a) of S. 2475 as amended, Calendar No. 905.

[13] So far as we have been able to determine, the decision has not as yet been officially reported. However, a complete copy of the opinion appears in 5 W. & H. Rep. 103.

and therefore the Administrator had investigatory power over all industry, without restriction, to determine whether any person had violated any provision of the Act. To this contention the Court answered:

> "To adopt this strained construction would extend the sweep of his inquisitorial power beyond the apparent intention of Congress, *as evidenced by the repeated limitations of the applicability of the Act to those subject to its provisions.* An Administrator must restrain himself within the bounds of his delegated authority." (Italics supplied.)

Stating, after an analysis of the Act, that "it is obvious that Congress had well in mind the applicability of the Act only to interstate commerce engagements", the Court held that a subpoena issued by the Administrator for the production of books and records could not be enforced prior to the determination of the question whether the employer to whom the subpoena was directed fell within the coverage of the Act, *i. e.*, whether he was engaged in interstate commerce or in the production of goods therefor.

Section 11(c) of the Act provides as follows:

> "*Every employer subject to any provisions of this Act* or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder." (Italics supplied.)

Here again the language "Every employer subject to any provisions of this Act" has been judicially construed

in complete accordance with the contention of Petitioner. Thus, in *General Tobacco and Grocery, Co.* v. *Fleming, supra,* the Court, in referring to Section 11(c) stated:

> "Such employer, to be subject to the coverage of the Act, must be engaged in interstate commerce or in the production of goods for interstate commerce."

(2) The scope of Sections 6 and 7 of the Act as established by the legislative history.

A consideration of the aggregate of certain aspects of the legislative history of the Act, particularly of the action taken by the Conference Committee with regard to the differing bills passed by the Senate and House, makes it clear that the Act was intended to apply only where both the employer and the employee in question met the necessary requirements for coverage, and further explains the present form of the language of Sections 6 and 7, which has been seized upon in isolation by the Administrator as the sole basis for his position.

Certain features of the Senate bill have already been discussed in connection with the treatment of particular sections of the Act and may be summarized as follows:

(i) The bill was directed to the elimination of sub-standard labor conditions in "occupations" in and directly affecting interstate commerce;

(ii) No statutory minimum wages or maximum hours were set up but instead it was provided that the Labor Standards Board should declare particular minimum wages and maximum hours for any such "occupations"; and

(iii) It authorized the Labor Standards Board to investigate, in determining the existence of violations, employment conditions in any "occupation subject to this Act."

With regard to the above features, the House bill has been shown to have been substantially identical with

respect to the first, while with respect to the second and third it differed radically by fixing a single inflexible minimum wage and maximum work week which was not subject to modification and by providing for the investigation of employment practices in industries affecting [interstate] commerce. The House bill applies its minimum wage and maximum work week only with respect to "employers engaged in commerce" in "industries affecting commerce." The Secretary of Labor was charged with the duty of determining, upon application of the criteria set up by the bill, whether a given industry was one "affecting commerce" and until he did so, the fixed wage and hour standards were not applicable. If he so found, they applied automatically with respect to *every* employee employed by "every employer engaged in commerce in any industry affecting commerce".[1]

The bills passed by both chambers were rewritten by the Conference Committee, whose recommendations in the form of a Conference bill were passed by Congress on June 25, 1938.[2]

The Conference Committee made such changes in the two bills as clearly to indicate the applicability of the Act only where both the employer and employee met the requirements as to interstate commerce.

First, as has been shown above, the substantially identical findings and declaration of policy contained in both the House and Senate bills to the effect that sub-standard labor conditions should be eliminated "in *occupations* in interstate commerce," were changed in the Conference agreement to refer only to such conditions "in *industries* engaged in commerce or in the production of goods for commerce." If, as the Administrator contends, the Act contains no "industry" limitation, this action of the Conference Committee in deliberately making the purpose of the Act narrower than the means of carrying it out is incomprehensible.

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[1] S. 2475, as passed by the House, Sections 4, 5(a).

[2] Pub. L. No. 718, 75th Cong., 3rd Sess., 52 Stat. 1060, 29 U. S. C. Sec. 201 *et seq.*

Second, the rigid scale of wages and hours of the House bill was retained in a milder form and at the same time this rigid wage scale was combined with the flexibility of the Senate bill by providing for the creation of interstate industry committees which had power to investigate and, after consideration of the relevant economic factors, to recommend minimum wages higher than those provided in the rigid scale.

Third, Sections 5 and 8 on the one hand and Section 6 on the other, created to deal with the common problem of minimum wages, were given internal cross-references which indicate that their scope is identical.

Fourth, the provision in the House bill authorizing the Secretary of Labor to investigate practices of employment "in any industry subject to this Act" was retained almost verbatim as Section 11(a) of the Conference bill.

Fifth, Section 11(c), dealing with the keeping of records, was limited to "every employer subject to any provisions of this Act."

The only answer that the Administrator has been able to supply in an attempt to offset the evidence from the legislative history which has been set forth above, has consisted of two assumptions. These are (*a*) that the Senate bill was based on *employee* activity alone without regard to the interstate character of the employer; and (*b*) that this basis of coverage was adopted without change by the Conference Committee, which drafted the Act as finally passed. The Administrator has, as he must, conceded that the House bill covered only the employees of an interstate employer.[3] The Administrator's case falls, therefore, if either of his two assumptions is erroneous. The actual facts show that the first assumption is probably, and the second one certainly, false.[4]

[3] Brief of Administrator in the Circuit Court of Appeals at page 33.

[4] Petitioner has consistently so contended, and has never conceded that even the first assumption is correct. The error of the second assumption seemed to it so clear, however, that the first assumption was not examined in detail in its brief in the Circuit Court of Appeals although it was discussed in its brief in the District Court.

(a) *The Senate bill.*

The recital of conditions to be remedied, that appeared in the main wage and hour section of the Senate bill,[5] directly contradicts the Administrator's theory, as embodied in the first assumption mentioned above. This recital expressly and repeatedly referred to "interstate industries."[6] Thus, Section 4(a) provided:

> "Whereas wages paid *in interstate industries* vary greatly between industries and throughout the Nation, reaching as low as $5. or less per week; and
>
> "Whereas hours of labor *in interstate industries* also vary greatly between industries and throughout the Nation, reaching as high as 84 hours per week; and * * *
>
> "Whereas it is necessary for the development of American commerce and the protection of American workers and their families that substandard wages and hours be eliminated *from interstate industry and business;* * * *." (Italics supplied.)

Moreover, the explanation in the Senate Committee report,[6] which accompanied and explained this bill, emphasized in the clearest terms that there was no intention of covering essentially local employers or business establishments, but only interstate business or industry. The same point was brought home again and again to the members of the Senate by the Chairman of the Committee on Education and Labor.[7]

The only scintilla of evidence upon which the Administrator can rely for his assumption that the Senate bill was based on employee activity without regard to the interstate status of the employer is the fact that the Senate bill, like the original bills, repeatedly refers to "occupations". The word "occupations" appears not only in

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[5] Section 4(a) of S. 2475, as passed by the Senate on July 31, 1937.

[6] Sen. Rep. No. 884, 75th Cong., 1st Sess., July 8, 1937, p. 5.

[7] 81 Cong. Rec., p. 7648. These statements, and that in the Senate Committee Report, are quoted at pp. 82-83, *infra*.

the legislative declaration of policy in Section 1 of the Senate bill but also in one of the main substantive coverage sections.[8]

While perhaps the connotation of the word "occupation" is a reference to employee activity, a careful examination of the Senate bill indicates that the word was also used in that bill as synonymous with the word "industry". Thus, the statutory definition was as follows:

> "SECTION 2. (a) * * *
>
> (5) 'Occupation' means an occupation, industry, trade, or business, or branch thereof or class of work or craft therein, in which persons are gainfully employed."

Moreover, throughout the bill the word "occupation" was used as a generic term comprehending *both* employers and employees. Thus, in Section 9, sub-sections (3) and (4) of the Senate bill, the Labor Standards Board was given power to classify "*employers, employees* and employment *within the occupation* to which such order relates * * *". (Italics supplied.) This bill also provided in Section 11 for the establishment of Advisory Committees to be composed of "*employers and employees*, or organizations thereof, *in such occupation.*" (Italics supplied.)

Thus there is extreme doubt as to the correctness of the Administrator's theory as to the meaning of the Senate bill itself. The theory is based entirely upon the word "occupation" without regard to the manner in which it was used and defined in the Senate bill. The possibility that the word was susceptible of such an interpretation as the Administrator tries to give it may well be the explanation for the fact that it was supplanted in the Act by the word "industry" which appeared in the House bill.

[8] Section 4 of S. 2475, as passed by the Senate on July 31, 1937.

(b) *The Conference Committee bill.*

In any event, the Conference Committee bill clearly rejected the theory now advanced by the Administrator. Statements made on the floor of the Senate by the most authoritative spokesmen, the Senate Conference Committee managers, establish that the Act as finally drafted and passed was intended to apply only to employees who are both employed in an interstate industry and are themselves engaged either in interstate commerce or in the production of goods for interstate commerce.

The formal Conference Report was presented to the Senate on June 14, 1938, by Senator Elbert D. Thomas, Chairman of the Senate Committee and one of the managers of the bill for the Senate.[9] In introducing and explaining the main provisions of the bill, he repeatedly referred to "industries covered by the Act." Moreover, in explaining that *the minimum wage rates fixed in the Act "for all industry producing for interstate commerce"* could be increased (not however to exceed forty cents an hour) when substantial curtailment of employment would not result, he indicated clearly that Sections 6 and 7 were intended to cover a field no broader than Sections 5 and 8. Thus he stated:[10]

> "Having fixed a rudimentary floor for wages for *all industry producing for interstate commerce,* we decided to authorize separate and, when substantial curtailment of employment would not result, higher minimum rates (not exceeding 40 cents an hour) to be fixed industry by industry. But again to guard against the forces of inertia we provided that *all industries covered by the act* must be brought up to a minimum of 40 cents not later than 7 years after the effective date of the act, unless it should be definitely established by a preponderance of the evidence that such a rate would substantially curtail employment in the industry." (Italics supplied).

[9] 83 Cong. Rec., 75th Cong., 3d Sess., pp. 9158-9162.

[10] 83 Cong. Rec., p. 9164.

The same concept of the coverage of the Act was repeated by Senator Thomas in a subsequent statement, almost immediately following:[11]

> "With the powers of the administrative agency so limited, we decided to set up, in place of the administrative board provided in the Senate bill, an independent Administrator in the Labor Department. We authorized the Administrator to set up, as soon as practicable after the act becomes effective, *an industry committee for each industry affected by the act* to make recommendations to him concerning the establishment of minimum wages for such industry, which may be higher but not lower than the *rigid minima prescribed in the act for industry generally.*" (Italics supplied).

Shortly after the submission of the Conference Report and the explanatory statements of Senator Thomas, Senator Borah and Senator Bailey engaged in a debate on the constitutional power of Congress to regulate wages and hours of *all* workers employed by an employer engaged in an interstate business.[12] It seems clear that both Senator Borah and Senator Bailey understood the bill to attempt to reach only employees of an employer who himself was engaged in commerce or in the production of goods therefor.[13] Their disagreement was on the question as to whether it would be constitutional, assuming that the bill reached all employees of an interstate employer regardless of their duties.

To put this discussion at rest, Senator Claude Pepper, a member of the Conference Committee, arose to explain that the difficult constitutional question which was being discussed by Senators Borah and Bailey was in effect academic since the bill did not go so far as Senator Bailey

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[11] 83 Cong. Rec., p. 9164.

[12] 83 Cong. Rec., pp. 9166-9175.

[13] For evidence of this fact see the discussion by these Senators in 83 Cong. Rec., pp. 9166, 9167, 9169, 9170, 9172.

feared. Senator Pepper stated that it did not apply to all employees of an industry which itself is engaged in interstate commerce but only to employees who are both employed in an interstate industry and are themselves engaged either in interstate commerce or in the production of goods for interstate commerce. Senator Pepper's statement was as follows:[14]

> "So that the conference committee had before it the question of whether this proposed law should be applied to all employees of an industry which itself is engaged in interstate commerce although the individual employees may not necessarily themselves be engaged in interstate commerce or whether its application should be applied or made to the employees themselves who were engaged either in interstate commerce or in the production of goods for interstate commerce." * * *
>
> "I want it distinctly stated that this proposed law is not applicable to all employees of an industry which itself is engaged in interstate commerce. It is applicable only to those employees who themselves are engaged either in interstate commerce or in the production of goods for interstate commerce, and the contrary theory was definitely rejected by the committee."

The Administrator has urged that Senator Pepper's statement above quoted may be compatible with the proposition that employees may come within the Act even though their employer is not himself engaged in interstate industry.[15] The fallacy of this contention is immediately disclosed when Senator Pepper's statements are read, as they properly should be, in the context of

[14] 83 Cong. Rec., p. 9168. The temporary interruption by Senator Chavez of the discussion between Senators Borah and Bailey seems not to affect the bearing of Senator Pepper's remarks.

[15] This viewpoint has been adopted in *Fleming* v. *American Stores Company*, 42 F. Supp. 511 (E. D. Pa., Dec. 30, 1941), which of course was bound to follow the decision of the Third Circuit below.

the surrounding discussion and of the statements made by Senator Thomas at the time of the submission to the Senate of the Conference bill.

Should any doubt however remain as to the correct interpretation of Senator Pepper's remarks, it is eliminated by a subsequent statement made by Senator Pepper in response to a further objection by Senator Bailey.[16]

> "Mr. Pepper. If the Senator will allow me once more, I will not interrupt him further. On the contrary, the conference report provides that resort may be had to the circuit court of appeals by any petitioner who alleges that he is unlawfully affected by this bill, and *if he may be able to show that he is not engaged in commerce or is not engaged in the production of goods for interstate commerce it will be the duty of the court to exempt him from the application of the law.*" (Italics supplied.)

The Court below did not attempt to reconcile the result that it reached with the explanations of the scope of the Act given by the Senate conferees. No attempt was made because, we believe, no reconciliation is possible. Instead the Court ignored the explicit statements by Senate spokesmen and relied entirely upon general language in the report of the Conference bill given to the House by its conferees.[17]

That language, as quoted in the opinion below, is as follows:

> "Section 6 of the conference agreement provides for the establishment of minimum wages for employees engaged in commerce or in the production of goods for commerce. The House amendment provided for the establishment of minimum wages if the

[16] 83 Cong. Rec., p. 9168.

[17] H. Rep. No. 2738, 75th Cong. 3d Sess., pp. 29-30.

employer was engaged in commerce in any industry affecting commerce * * *.

"Section 7 of the conference agreement provides for the establishment of maximum hours of employment for employees engaged in commerce or the production of goods for commerce. The House amendment provided for the establishment of maximum hours of employment if the employer was engaged in commerce in an industry affecting commerce * * *."

This statement of the House conferees cannot, of course, be given any independent probative force inasmuch as it merely paraphrases and contrasts the respective provisions of the House bill with those of the Conference Committee bill.

It will be recalled that the House bill provided that "every employer engaged in commerce in any industry affecting commerce shall * * * pay *each* employee employed by him * * *" certain minimum wages and also that "no employer engaged in commerce in any industry affecting commerce shall employ *any* of his employees * * *" in excess of certain maximum hours without paying overtime compensation.

Accordingly the House conferees were reporting to the House that the conferees had changed the House bill by deleting from those sections which became Sections 6 and 7 of the Act the foregoing language which had appeared in the House bill. Obviously if the Senate conferees had adopted a similar report to the body of the Senate, such a report would have contrasted Sections 6 and 7 of the Conference Committee bill with the corresponding provisions of the Senate bill. The above quotation from the House conferees' report of course contains no indication of the reason for the changes in these sections, and, as is common in such documents, in treatment of particular sections, it makes no reference to the plan of the Act as a whole.

The Petitioner readily admits not only this change, but also that in conjunction therewith the limitation as to the type of employee covered by the Act, which was included in the Senate bill, was in substance restored. But in view of the ample evidence in the Act as a whole of its application upon an industry basis, the change in these sections can be attributed only to the desire of the Conference Committee to emphasize that *not all* the employees of an employer engaged in an interstate industry should be covered by the Act, but only those types of employees which it specified. In other words, having already made clear the general industry basis of the Act, Sections 6 and 7 were now chosen by the Conference Committee to make clear its intentions with regard to employee coverage, whereas the House bill had chosen this point for a delineation of the necessary type of employer coverage.[18]

It may therefore properly be said that the Conference Committee restored the test of coverage contained in the Senate bill, *provided* that this statement is limited to coverage as to *employees*.[19]

Not only in the Senate, as has been shown above, but in the House as well authoritative discussion seems clearly to support the Petitioner's contention. For example, Representative Schneider, a member of the Committee on Labor of the House (to whom Representative Welsh, a member of the Conference Committee and one of the managers of the bill in the House, yielded), in discussing the scope of the bill, stated:[20]

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[18] The fact which the Administrator has pointed out in his Brief in the Circuit Court of Appeals (p. 28), that the exemptive provisions of the Act run specifically to employers in some instances and to employees in others is still another indication that Congress was thinking in terms of the dual tests of coverage.

[19] In view of the "industry" background of the Senate bill recited therein, it is possible that the statement might also apply to employer coverage. See *supra*, pp. 31-32.

[20] 83 Cong. Rec., p. 9260.

"The measure as reported out by the conference report *applies to interstate business exclusively.* This is of course, very well known. It must be repeated, however, to avoid any misunderstanding of the bill, that it does not in any way, shape or form affect intrastate or purely local or State business. *It covers only interstate commerce; that is business which is interstate in character.*"

* * * * * * *

"By starting with such a low minimum wage of 25 cents an hour for the first year, the law will not affect any industry disastrously. However, it is well to realize that Congress, by the passage of this act, is going on record to the effect that *an industry or business of an interstate character* which cannot pay at least 25 cents an hour to its employees has no justification or reason for existence." (Italics supplied.)

(3) Petitioner's interpretation is confirmed by administrative and constitutional considerations deemed important by Congress.

(a) *Administrative flexibility* vs. *blanket standards.*

From the outset of Congressional discussion of a Fair Labor Standards Act one of the most important questions was whether wage and hour standards should be set in blanket terms in the statute itself or whether they should be determined and applied by an administrative body. The Senate bill used the more flexible approach. The House bill provided fixed standards. However, it did not operate directly but only after a prior determination by the Secretary of Labor that an industry was one *"affecting commerce."* Thus even the House bill was not so rigid and automatic in operation as Sections 6 and 7 of the Act if they are considered in isolation, as the Administrator contends they should be.

The bill written by the Conference Committee was regarded as a compromise. Sections 6 and 7 embody the House approach of fixed standards while Sections 5 and 8 represent the Senate view that flexibility was desirable. This compromise was of course accepted by the Senate Conferees[1] with the understanding that the two sets of sections would cover the same area and be co-ordinate in operation.

The question of administrative flexibility versus blanket statutory standards was not merely a legislative problem in the choice of methods of administration. It was also regarded as an important constitutional problem and was consciously faced as such by Congress from the beginning.

Thus at the joint hearings on the proposed legislation held by the House Committee on Labor and the Senate Committee on Education and Labor, the opening statement of the then Assistant Attorney General Robert H. Jackson expressed grave doubt as to the Congressional power to fix a single minimum wage rate and maximum work week, which would be inflexible and generally applicable to all industry throughout the Country. He said that if Congress did so it would run the risk of having its right to do so "tested in the Courts under its most unfavorable aspect as a violation of due process."[2] Mr. Benjamin Cohen appeared before the sub-committee of the House

[1] See Forsythe, *Legislative History of The Fair Labor Standards Act*, 6 Law & Contemp. Problems, pp. 464, 473:

"The deadlock in the conference was holding up adjournment and it was freely predicted that once again the wage and hour legislation would fail. Senators Ellender and Pepper, members of the conference, at first refused to accede to a statutory wage ever going above 30¢ an hour, but compromises as to flexibility in attaining minima and the inclusion of a provision which could be construed to allow regional differentials (although expressly disclaiming it) paved the way to agreement in the conference and a completely rewritten bill. This was adopted by the House on June 13th and by the Senate on June 14th with comparatively little debate."

[2] Joint Hearings before The Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st Sess. (1937), p. 20. Hereinafter cited as "Hearings."

Committee on Labor prior to action upon the Senate bill by the House of Representatives in 1938 and expressed the same doubts, stating that it would be preferable to provide a flexible minimum to be determined by an independent administrative body.[3] Mr. Gerard Reilly, the then Solicitor of the Department of Labor, not only appeared before that sub-committee and agreed with the testimony of Mr. Cohen but he also submitted a brief in which he questioned the power of Congress to fix a single inflexible minimum wage and maximum work week without violating the "due process" clause of the Fifth Amendment. On the other hand he pointed out that this Court had upheld the power of a state to fix minimum wages under a statute which delegated to a fact finding agency the power to establish varying wage rates in accordance with the guides and standards set forth in the statute.[4]

The doubts set forth above extended not to merely a portion of the field covered by the proposed legislation, but to a matter equally applicable throughout its entire scope. It is hard to resist the conclusion that the retention in the Conference agreement of the flexible wage provisions of the Senate Bill was due in large part to these expressions, and thus that Congress intended the scope of its corrective, flexible wage provisions to be coextensive with Sections 6 and 7 which uniformly applied to all interstate industries.

(b) *Congressional regard for doubts as to the extent of its power to regulate wages and hours.*

That Congress intended to make the Act applicable only to employees of an employer engaged in interstate commerce or in the production of goods therefor is further evidenced by Congressional recognition of constitutional problems relating to the extent of its power to pass any such legislation at all. For years this Court had held that legislation providing for minimum wages or mini-

[3] 83 Cong. Rec., 75th Cong., 3rd Sess., page 7302.

[4] *Ibid.*, pp. 7301-7302.

mum prices in private industries violated "due process" by interfering with liberty of contract. However in 1934 it conceded the validity of a state statute regulating price fixing;[5] and on March 29, 1937, less than two months prior to the introduction in Congress of the original bills which were the antecedents of the Act, it held valid a state statute providing for the establishment of minimum wages for women.[6] In each case, a divided court by the narrow margin of a five to four vote, while recognizing the general doctrine against impairment of liberty of contract, found that whatever infringement upon this right had taken place was justified by considerations of life and health, and the protection of business essential to the economic vitality of the State.

Although this Court in those cases did not concede the plenary power of Congress or of the States to enter the field of price or wage regulation, yet the two decisions were regarded as establishing new outposts in the permissible area of industrial regulation.

Not only had this Court prior to those decisions held that legislation providing for minimum wages in private industry violated "due process"; but it had also held that Congress had no power to fix the wages and hours of employees engaged in production in interstate industry since production preceded commerce and production was a local matter over which Congress had no control.[7] However, on April 12, 1937, exactly six weeks before the original bills were introduced, it held the National Labor Relations Act constitutional.[8] In the light of that decision there was justification for the opinion that Congress had the power under the commerce clause to enact labor legislation with respect to interstate industry, although, of course, the exercise of that power was limited by the "due process" clause of the Fifth Amendment.

[5] *Nebbia* v. *New York*, 291 U. S. 502 (March 5, 1934).

[6] *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (March 29, 1937).

[7] *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (May 18, 1936).

[8] *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1 (April 12, 1937).

Under the National Labor Relations Act, however, the test of coverage was the nature of the *employer's* business and the extent to which an interruption thereof resulting from unfair labor practices would tend to obstruct interstate commerce. This Court, while upholding the validity of that Act, pointed out that that Act did "not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce" but purported "to reach only what may be deemed to burden or obstruct * * * commerce."

The Court further stated, "whether or not particular action does affect commerce * * * is left by the statute to be determined as individual cases arise."[9] Such a statute obviously was far different from one which attempted, in the exercise of power granted under the commerce clause, to fix wages and hours of employment in interstate industry generally irrespective of whether the existence of substandard wages and hours in individual cases had any effect upon commerce.

It was in this state of the development of constitutional law that Congress, in the exercise of its power to regulate interstate commerce, approached its task of attempting to frame an act fixing minimum wages and maximum hours of employment of employees engaged in interstate industries. It is hardly an exaggeration to say that no legislation which Congress had theretofore considered was approached by that body with greater consciousness of the constitutional questions involved. The provisions of the original bills probably incorporated more constitutional theories than any other piece of suggested legislation in the history of the country. The idea was, as Mr. Jackson indicated,[10] to consolidate all hopeful approaches to constitutionality. He stated:

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[9] *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, 32 (1937).

[10] Hearings, p. 54.

"This act combines everything, and is an effort to take advantage of whatever theories may prevail on the Court at the time that the case is heard."

In an effort to frame an act which would at one and the same time eradicate the evils of sub-standard labor conditions "in industries engaged in commerce or in the production of goods for commerce", and be free from doubts as to its constitutionality, it seems clear that Congress intended the coverage of the Act to depend not only upon the interstate nature of the activities of the particular employee but also upon the interstate character of the employer's business.

(4) Judicial Authority.

In addition to the decision of the Third Circuit in the instant case and that of the Second Circuit in the case of *Fleming* v. *Arsenal Building Corporation*,[1] the applicability of the Act to building service employees employed by a landlord who rents space to tenants engaged in interstate commerce or in the production of goods therefor, has as stated above been presented before different federal and state courts in five other cases, all of which have held, contrary to the two above Circuits, that the Act does not cover such employees. Thus, on the specific question raised in the present case—viz., the application of the Act to building service employees—the score is five to two against the view of the Third Circuit in the present case.

Of the five adhering to the majority view, four proceed on the principle *inter alia* that the Act is not applicable to employees of an employer who himself is neither engaged in interstate commerce nor in the production of goods therefor,[2] thereby affording judicial support for the view of the Petitioner here asserted.

[1] 125 F. (2d) 278 (C. C. A. 2d., Dec. 30, 1941).

[2] The other proceeds on the theory that such employees are not engaged in the production of goods for interstate commerce since their services do not directly contribute to such production. *Robinson* v. *Massachusetts Mutual Life Insurance Company*, 158 S. W. (2d) 441. See pp. 63-64, *infra*.

Thus, in *Killingbeck and Riddoch* v. *Garment Center Capital, Inc.*, 259 App. Div. 691, 20 N. Y. Supp. (2d) 521 (1940),[3] on facts substantially the same as those here involved, the Court directed that judgment be entered for the defendant and in its opinion stated:

> "We think that the statute does not include such employees *when they are not employees of a manufacturer who is engaged in interstate commerce.*"

Similarly, in *Merryfield, et al.*, v. *F. M. Hoyt Shoe Corporation*, 41 F. Supp. 794 (D. N. H. Nov. 6, 1941),[4] the Court in its opinion stated (p. 796):

> "I hold that employees of a landlord who is not himself engaged in the manufacture of goods for interstate commerce but whose premises are leased to others who are engaged in the production of goods for commerce do not come within the provisions of the Wages and Hours Law of the Fair Labor Standards Act."

And in *Cecil, et al.*, v. *Gradison, et al.*,[5] the Court of Appeals for the First Appellate District of Ohio stated:

> "• • • it is clear that the Act does not apply to employees of intrastate employers engaged to and actually performing intrastate acts, notwithstanding such intrastate acts incidentally facilitate the interstate commerce or the production of goods for such commerce carried on by others with whom they are not otherwise related."

To the same effect is *Johnson* v. *Filstow, Inc.*, 5 W. & H. Rep. 286, decided by the United States District Court for the Southern District of Florida on March 30, 1942.

Cases which have specifically considered the question in fields other than that of building operation are likewise in accord with the position herein taken.

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[3] See *supra*, p. 9.

[4] See *supra*, p. 10.

[5] See footnote 4, p. 10, of this Brief, *supra*.

Thus, in *Pedersen* v. *J. F. Fitzgerald Construction Co.*, 262 App. Div. 665 (N. Y. Sup. Ct., App. Div., Nov. 12, 1941), suit was brought for overtime compensation asserted to be due under the provisions of the Act by employees who were employed by the defendant, a construction company under contract with an interstate railroad company to construct new abutments under railroad bridges and to repair the superstructures of other such bridges. In the course of its opinion holding that the Act did not apply to the plaintiffs, the Court stated as one of its grounds for denying recovery:

> "Nor were these plaintiffs employees of a manufacturer engaged in the production of goods for commerce. The defendant here was merely a contractor engaged in local construction and repair work for the railroad corporation."

In *Farr* v. *Smith Detective Agency and Nightwatch Service, Inc.*, 38 F. Supp. 105 (N. D. Tex. April 14, 1941), the defendants were engaged in supplying watchman service to their customers who were engaged in various business activities. The plaintiff, a night watchman, was employed by the defendants and was assigned to watch the premises of a bank alleged to be engaged in interstate commerce. Suit was brought to recover the amount of overtime payments to which the plaintiff claimed he was entitled under the Act. The defendants moved to dismiss the action, *inter alia*, on the ground that the plaintiff did not allege that the defendants were engaged in interstate commerce. In sustaining the motions to dismiss the Court said:

> "It [the Act] is a statute which is quite plain itself. It has penalties and obligations and criminal liabilities and *is directed at employer and employee engaged in interstate commerce.* An officer who walks down the street and who happens to be assigned for

> the moment or for the month to a place which is engaged in interstate commerce, does not thrust his employer in interstate commerce. His employer is not engaged in producing goods for interstate commerce. He ought not to be subjected to the penalties and pains of the statute." (Italics supplied).

A similar conclusion was reached in *Baggett* v. *Henry Fischer Packing Company*, 37 F. Supp. 670 (W. D. Ky. February 24, 1941). There the plaintiff brought action to recover from the defendant wages which he alleged the defendant owed to him under the provisions of the Act. In the course of its opinion the Court stated:

> "Since the complaint claims jurisdiction of the Federal Court by virtue of the provisions of the Fair Labor Standards Act it is necessary that it state sufficient facts to show that such jurisdiction exists. *As above pointed out one of those facts is that the plaintiff, as well as the defendant, be engaged in commerce or in the production of goods for commerce.*" (Italics supplied).

To the same effect is *General Tobacco and Grocery Co.* v. *Fleming*, F. (2d) (C. C. A. 6th, Feb. 5, 1942),[6] where the Court stated:

> "Such employer, to be subject to the coverage of the Act, must be engaged in interstate commerce or in the production of goods for interstate commerce."

Decisions can of course be found containing dicta to the effect that the test of coverage is dependent solely upon the activities of the individual employee regardless of the nature of the business in which the employer is engaged. However, those cases for the most part are of

[6] So far as we have been able to determine, the decision has not as yet been officially reported. However, a complete copy of the opinion appears in 5 W. & H. Rep. 103.

the type where it is apparent that the employer was engaged either in interstate commerce or in the production of goods therefor and thus the only question before the Court was whether the activities of the employees in question were of the requisite type to bring them within the Act.[7]

The only decision cited by the Second Circuit, in its opinion in *Fleming* v. *Arsenal Building Corporation, et al., supra,* (other than the decision of the Third Circuit in the instant case), as being opposed to the contention here asserted, is that of *Allen* v. *Moe,* 39 F. Supp. 5 (D. Idaho N. D. 1941). But the decision in that case is most explicit authority in support of the Petitioner's contention that Section 7 of the Act extends only to employers engaged in commerce or in the production of goods therefor. Thus, the Court stated:

> "It seems clear that section 207 (a) [sec. 7] relating to maximum hours relates to the employer who is engaged in commerce or in the production of goods for commerce: • • •".

The only case cited by the Third Circuit in the instant case as authority for the view that the application of the Act is determined solely by the character of the employee's work is *Hall* v. *Warren-Bradshaw Drilling Co.,* 40 F.

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[7] To this class of cases belongs *Sunshine Mining Co.* v. *Carver,* 34 F. Supp. 274 (D. C. Idaho, 1940), where the employer was a mining company which extracted ore which it sold within the state to a smelter who in turn sold and shipped the metal derived therefrom in interstate commerce; *Wood* v. *Central Sand & Gravel Co.,* 34 F. Supp. 40 (W. D. Tenn. 1940), where the court held the employer to be engaged in interstate commerce; and *Rock* v. *Zarnocay,* 4 W. & H. Rep. 305 (N. Y. Sup. Ct. 1931), where it was held that the Act applied to an employee who made interstate tours with his employer's band, loaded and unloaded the baggage and equipment of the band on tour from state to state and assisted in radio broadcasting over interstate hookups. Compare *Fleming* v. *Goldblatt Bros., Inc.,* 39 F. Supp. 701 (N. D. Ill. 1941); *Gerdert* v. *Certified Poultry and Egg Co.,* 38 F. Supp. 964 (S. D. Fla. 1941); and *Abadie* v. *Cudahy Packing Co.,* 37 F. Supp. 164 (E. D. La. 1941), in all of which the Court stated that it is difficult to see how an employee could be engaged in commerce or in the production of goods for commerce unless his employer were likewise engaged.

Supp. 272 (N. D. Tex. 1941). It is true that that District Court appeared to express such a view. But however that may be, the Fifth Circuit Court of Appeals, in affirming the decision of the District Court, found the employer to be engaged in the production of goods for interstate commerce. In its opinion it stated:[8]

> "Appellant and its employees are engaged generally in mining for and the production of oil in this state, * * *."

Thus, the Act itself, its legislative history, and the great preponderance of judicial authority all support the view that the Act is not applicable to employees of an employer who himself is neither engaged in interstate commerce nor in the production of goods therefor.

III

PETITIONER'S MAINTENANCE AND SERVICE EMPLOYEES ARE NOT ENGAGED IN THE PRODUCTION OF GOODS FOR INTERSTATE COMMERCE WITHIN THE MEANING OF THE ACT AND CONSEQUENTLY ARE NOT COVERED BY IT.

(1) Preliminary statement; Administrator's contention.

Some of the Petitioner's tenants are engaged in the production of goods for interstate commerce; and since the Petitioner's employees are employed in maintaining and operating the building in which those tenants conduct their manufacturing operations, the Administrator contends that their services are "necessary" to the production of the tenant's goods and thus that such employees are engaged in the production of goods for commerce and consequently covered by the Act.

This contention is based upon Section 3 (j) which provides as follows:

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[8] *Warren-Bradshaw Drilling Co.* v. *Hall*, 124 F. (2d) 42 (C. C. A. 5th, Dec. 9, 1941. *Cf., Boyd* v. *Dowell, Inc.*, 5 C. C. H. Labor Cases par. 60, 770 (D. C. Lea Co. N. Mex., 1941).

"'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or *in any process or occupation necessary to the production thereof*, in any State." (Italics supplied.)

The Administrator's entire case[1] is based upon the word "necessary" contained in the last phrase of this definition. He has taken a very broad view of its meaning, contending in effect that *any* employee of an employer engaged in commerce or in the production of goods for commerce is "necessary to production." He reasons that even building maintenance, service and clerical employees of an interstate employer must be covered because "if they were not doing work 'necessary to the production' of the goods they would not be on the payroll".[2] In other words he has taken the position that the running of a business enterprise is equivalent to the physical production of goods.[3]

Many courts, actuated no doubt by a desire to give the broadest possible scope to what they regard as a "remedial" statute, have followed the Administrator's

[1] It is also contended that the elevator operators are engaged "in commerce". This subsidiary argument is discussed separately, *infra*, pp. 69-75.

[2] Interpretative Bulletin No. 1, issued Sept. 22, 1938, 1941 W. & H. Manual, p. 28.

[3] The Administrator's view is boldly stated in his Brief in the Circuit Court of Appeals at pp. 25 and 26. Thus he states:

"The end of the enterprise being production, the assertion that an employee is necessary to the enterprise seems tantamount to an admission that he is necessary to production."

Common knowledge suffices to drive home the distinction between business enterprise and production. The former deals with the financial side of affairs and looks toward the making of a profit. But the dictates of business enterprise may lead to actual *curtailment of production*, as in times of business recession. The distinction is basic in economic thought. *Cf.*, Veblen, *The Theory of Business Enterprise*, etc.

view and have held various maintenance and service employees when employed by an interstate employer, subject to the Act.

The Administrator now attempts the still further step of including building maintenance and service employees not of an interstate producer but of one who contracts with such a producer to supply building space (together with the building service commonly connected therewith). He predicates his argument upon the reasoning that if such employees had been employed by each of the manufacturer-tenants rather than by the landlord, there would be no question but that their services were "necessary" to the enterprise engaged in the production of the goods. Consequently they must come within the Act even though their services are rendered to an employer who is not a manufacturer but merely a landlord.

This attempt has succeeded in the Second Circuit. The Third Circuit in the present case went even further by holding that the word "necessary" included not only those employees whose services were deemed indispensable to production but also those whose services were deemed "*convenient and appropriate to the maintenance of a building suitable for the manufacture of goods for commerce.*"[4] All other courts that have considered the precise question of building maintenance and service employees of a landlord have held to the contrary.[5] They have realized that it would do violence to the intention of Congress to go so far.

(2) The statutory definition of the word "produced" as contained in Section 3(j) of the Act.

The wording itself of the definition of "produced" strongly suggests that the Administrator is in error, even

[4] Opinion of the Third Circuit Court (R., pp. 219-220).

[5] See pp. 62-65, *infra*.

where maintenance employees are in the hire of an interstate enterprise. The definition in Section 3 (j) begins by saying that—

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any state; * * *"

The definition then continues to state that an employee shall be deemed to have been engaged in the production of goods if such employee was employed in—

> "producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

It would be difficult to frame a definition better adapted to the purpose of delimiting and describing activity devoted to the physical[1] production of tangible[2] goods. That is the obvious objective of the definition and its common core of meaning. Various words, more or less synonymous, were named to make sure that all processes integrally related to physical production of goods would be covered. Finally, to make certain that this enumeration had not left any gaps, there was added a catch-all phrase, "or in any process or occupation necessary to the production".

Not even the Administrator has contended that the

[1] The word "physical" as used above is of course redundant. It is inserted only to emphasize that when Congress said "production", it meant production in the sense normally (until the advent of the Administrator) given to it.

[2] Section 3 (i) of the Act states: "'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

Petitioner's employees produce, manufacture, mine, handle, transport or in any other manner work on goods. He relies entirely on the catch-all phrase.

According to the Administrator this phrase adds something new and different to the definition. He says, "This definition has, in effect, two parts",[3] the implication being that the second is more or less independent of the first. He even contends that the word "necessary" here should be treated as if it were the focal word of the general enabling clause of the Federal Constitution and the Court below has adopted this view.

Such an interpretation is of course out of place here. If ever a word or phrase should be interpreted by reference to its context, this surely is such a case. As stated in *McCulloch* v. *Maryland*, 4 Wheat. 316, 414 (1819):

> "It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word 'necessary' is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports."

We submit that the Court below has disregarded this admonition of Chief Justice Marshall. It has taken the word "necessary" out of its context and given it a highly excessive meaning. It has been frankly willing to include not only employees whose activities it called "indispensable * * * to the production by the defendant's tenants", but also activities of those employees which

[3] Administrator's Brief in the Circuit Court of Appeals at p. 13. The "two parts" are the last phrase and the entire definition preceding that phrase.

could only be termed "*convenient* and *appropriate* to the maintenance of a building *suitable* for the manufacture of goods for commerce" (R., pp. 219-220).

Disregarding constitutional difficulties for the moment, Congress certainly could never have intended to include all employees whose activity is "*convenient and appropriate*" to a facility that is "*suitable*" for the production of goods for interstate commerce, nor even all employees whose activity is "indispensable" to production. Food for workers is indispensable to production by such workers. But it is not necessary for us to recount a "parade of horribles". The imagination of this Court can readily supply examples of activity which would satisfy the tests of coverage advanced by the Court below but which could hardly be brought within the Act without giving the terms of the statute, and indeed the terms of the Constitution, the sort of unrealistic treatment that has been associated with ancient legal fictions.[4]

We do not, of course, pretend to be able to furnish a precise definition of the word "necessary" which will automatically answer all questions in every case that comes before the courts. Perhaps some employees are to be included who do not come in physical contact with the goods. But this much is certain. Some limiting factor must be placed upon the meaning of the words "process or occupation necessary to the production of goods." We believe that Congress meant to provide such a limiting factor by restricting the Act to industries engaged in commerce or the production of goods for commerce. As we shall see, the cases decided under this Act have recognized this limiting factor. While

[4] We are reminded for example of the writ of *quo minus* by means of which an ancient tax collector's office became the Court of Exchequer. Eventually all sorts of actions were entertained on the ground that recovery would help the plaintiff pay his taxes! Just so here the Administrator would bring within the jurisdiction of the Act activity having only the remotest connection with interstate commerce.

there are cases that have held the Act to include various maintenance employees performing duties similar to those here presented, in every one of these cases, the courts have been dealing with an employee of an interstate employer.

Moreover, not all employees even of an interstate producer were to be covered, and certainly not those building service and maintenance employees of an intrastate employer, such as the Petitioner herein, whose services do not directly function in the production of goods for commerce in any real sense. This is made clear in the most explicit terms by the legislative history of the Act.

(3) Legislative history.

It is not enough that an employee have *some* relation to or contribute to the economic advancement of an interstate employer. Nor is it sufficient that the services of an employee *affect* commerce or the production of goods for commerce. Congress meant to exclude from the Act employees who do not function directly in the production of goods even though they may be employed by an interstate employer (which of course is not the case here).

As has been mentioned above, the House Bill covered *all* employees of an interstate employer. The Senate Bill did not: it covered only such of those employees as were themselves engaged in commerce or the production of goods for commerce. In the Act as finally adopted, the Senate version prevailed. The matter was explicitly treated in the Senate discussion of the Conference Report by Senator Pepper,[1] a member of the Conference Committee.

[1] 83 Cong. Rec. 9168.

> "I want it distinctly stated that *this proposed law is not applicable to all employees of an industry which itself is engaged in interstate commerce. It is applicable only to those employees who themselves are engaged either in interstate commerce or the production of goods for interstate commerce,* and the contrary theory was definitely rejected by the committee." (Italics supplied)

The Administrator concedes that the Senate Bill prevailed.[2] In the light of Senator Pepper's statement it would be impossible to do otherwise. Yet the Administrator has adopted a business enterprise theory of "production" which directly contradicts the statement of Senator Pepper. In other words Congress rejected the House version but the Administrator adopted it!

Congress made it emphatically clear that not all employees of interstate employers were covered by the Act. "Production" does not mean business enterprise. But that is not all. The legislative history contains still further evidence that Congress did not intend to give an all-inclusive meaning to the words "production", "produce", or "necessary to production".

The Act as finally drafted by the Conference Committee deliberately rejected the theory of coverage based upon activity *"affecting commerce"* (that appeared in previous drafts) and adopted only the theory of coverage based upon activity "in commerce or in the production of goods for commerce". The words "affecting commerce" were of course well known to Congress. They had been used various times before; and they had been

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[2] This is not to say that Petitioner and Respondent agree as to other aspects of the matter. The Administrator also contends: (1) that the Senate version covered employees engaged in production even when their employer was not so engaged; and, (2) that in this respect also the Senate version prevailed. We believe these contentions to be erroneous. But there is no disagreement that as to employers "engaged in commerce or in the production of goods for commerce", only those employees are covered who are themselves so engaged.

recognized as coinciding with the maximum area subject to Congressional action under the commerce power.

Both the original bills introduced in Congress on May 24, 1937,[3] declared in almost identical terms that "The employment of workers under sub-standard labor conditions in occupations in interstate commerce, in the production of goods for interstate commerce, *or otherwise* directly *affecting* interstate commerce", has adverse effects upon interstate commerce the elimination of which "in occupations in and directly *affecting* interstate commerce" required Congressional action.

Furthermore, both the bill which passed the Senate on July 31, 1937,[4] as well as the bill which passed the House on May 24, 1938,[5] contained substantially identical statements of purpose.[6] The Senate bill was designed to eliminate sub-standard labor conditions "in occupations in and directly affecting interstate commerce" through the declaration by the Labor Standards Board of minimum wages and maximum hours for such occupations as were brought within the provisions of the bill; and the House bill was made applicable only when the Secretary of Labor determined that a given industry was "an industry *affecting* commerce".

However the Conference bill which ultimately became the Act eliminated these references to occupations or to industries "*affecting* commerce" and was limited by its terms to employers and employees "engaged in commerce or in the production of goods for commerce".

The rejection by the Conference Committee of the words "*affecting* commerce", which had been contained in the

[3] S. 2475 and H. R. 7200, Section 1.

[4] This was the bill reported by the Senate Committee on Education and Labor and was introduced in the Senate July 8, 1937, S. 2475, 75th Cong., 1st Sess., Calendar No. 905, as amended from the floor.

[5] This was the bill reported by the House Committee on Labor and introduced in the House on April 21, 1938. S. 2475, 75th Cong., 3rd Sess., Union Calendar No. 804, as amended from the floor.

[6] Section 1 of Senate bill, Section 2 of House bill. The latter differed slightly by omitting the word "directly" just before the word "affecting."

successive previous drafts of the statute, and the adoption in the Conference bill of the words "production of goods for commerce", graphically indicates that Congress did not intend that the scope of the Act should extend to acts merely "*affecting* commerce", but intended that it should cover only acts directly functioning in the "production of goods for commerce."

The significance of the change from the basis of "affecting commerce" to the narrower ones of "in commerce" and "production for commerce", and the contrast between the scope of the National Labor Relations Act and the Fair Labor Standards Act, have been recognized by many decisions. Thus in *Jewel Tea Co.* v. *Williams*, 118 F. (2d) 202, 206 (C. C. A. 10th, 1941), the Court stated:

> "The Act by its terms is limited to employees engaged in interstate commerce or in the production of goods for interstate commerce. *It does not extend to employment that merely affects interstate commerce.* If there could be doubt as to the correctness of this interpretation, it is set at rest by the legislative history of the Act." (Italics supplied.)

In *Chapman et al.* v. *Home Ice Co.*, F. Supp. , 5 W. & H. Rep. 133 (W. D. Tenn., Jan. 25, 1942), it was pointed out that:

> "We are not dealing with interstate commerce in its broad sense, but rather in a limited way under a particular act. Congress did not see fit to fix the coverage too broadly. It seems to have given consideration to those things which are reserved to the States under the Constitution. It might have used the phrase 'affecting commerce' as in the National Labor Relations Act * * *, had it not intended there should be a definite line drawn. The coverage here is limited to those employees who are engaged 'in commerce' *per se* or are engaged in the *production* and *handling* of goods and merchandise intended

for sale and distribution in the business world across State lines. • • •

"Here the words 'production for commerce' denote an intention to deal in a restricted way with the question of coverage in connection with those employed directly in the production of articles to be sold, shipped or transported across State lines 'in commerce'. • • •

"There is no question but that the icing of cars to preserve interstate shipments 'affects' the transportation of perishables. Indeed there could be no shipments of this class unless ice is used, but we are not dealing with coverage on so great a scale. We cannot add to the Act and make it cover broadly those things which 'affect' commerce. We take the Act as we find it." (Italics supplied).

And in *Merryfield* v. *F. M. Hoyt Shoe Corporation*, 41 F. Supp. 794 (D. N. H. 1941), the Court stated:

"The Fair Labor Standards Act is by its terms limited to employees engaged in interstate commerce, or in the production of goods for interstate commerce and does not extend to employment that merely affects interstate commerce."[7]

(4) Judicial authority.

Numerous cases have dealt with the question whether maintenance and service employees are engaged in the production of goods for commerce within the meaning of the Act. The results show considerable difference of opinion.[1]

[7] See also *Johnson* v. *Filstow, Inc.*, 5 W. & H. Rep. 286 (So. D. Fla. Mar. 30, 1942).

[1] Cases refusing to apply the Act include: *Rogers* v. *Glazer*, 32 F. Supp. 990 (W. D. Mo. 1940); *Brown* v. *Bailey*, 147 S. W. (2d) 105 (Tenn. Supreme Ct. 1941); *Brown* v. *Carter Drilling Co.*, 38 F. Supp. 489, (S. D. Tex. 1941); *Pedersen* v. *Fitzgerald Construction Co.*, 262 N. Y. App. Div. 655 (1941); *Overstreet* v. *No. Shore Corp.*, 4 W. & H. Rep. 628 (S. D. Fla. 1941); *Carlton* v. *London Mines*, 4 W. & H. Rep. 561, (Colo. Dist. Ct. 1941); *Hart* v.

It is highly significant, however, that this difference of opinion extends only to the case where employees have been in the hire of an interstate employer. In that situation a number of the courts have held the Act applicable. With respect to these results and the reasoning behind them several observations should be made.

In nearly all of these cases the emphasis is placed upon the interstate nature of the employer's business and many decisions explicitly assume that the proper test is whether activity is necessary or essential to the enterprise.[2] Such cases, in other words, have adopted the Administrator's view that a person "on the payroll" of an interstate employer must be necessary to that employer's enterprise and consequently his production.

As we have seen, such a view was emphatically not the

Gregory, 16 S. E. (2d) 837, (N. C. Supreme Ct., 1941); *Abadie* v. *Cudahy Packing Co.*, 37 F. Supp. 164 (E. D. La., 1941); *Cecil* v. *Gradison*, *supra*, p. 10, note 4, (Ohio Ct. of App. Nov. 17, 1941, Petition p. 53); *Robinson* v. *Massachusetts Mutual Life Insurance Co.*, 158 S. W. (2d) 441 (1941); *Merryfield* v. *Hoyt Shoe Corp. & R. F. C.*, 41 F. Supp. 794 (D. N. H. 1941); *Farr* v. *Smith Det. Agency*, 38 F. Supp. 105, (N. D. Tex. 1941); *Sybert* v. *Bradley*, 4 W. & H. Rep. 630, F. Supp. (S. D. Ill. 1941); *Cf.*, *Bowman* v. *Pace*, 119 F. (2d) 858 (C. C. A. 5th 1941) and *David* v. *Boylans*, 34 F. Supp. 555 (E. D. La. 1940).

Cases applying the Act, which the Administrator cited at p. 22 of his Brief in the Court below (excluding dicta, unreported cases and memorandum opinions that do not reveal the facts): *Bowie* v. *Gonzalez*, 117 F. (2d) 11 (C. C. A. 1st, 1941); *McMillan* v. *Wilson*, 4 W. & H. Rep. 409 (Minn. Dist. Court, 1941); *Lefevers* v. *Gen. Export & Metal Co.*, 36 F. Supp. 838 (S. D. Tex., 1940); *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40, (W. D. Tenn., 1940); *Hargrave* v. *Mid-Continent Petroleum Corp.*, 36 F. Supp. 233, (E. D. Okla. 1941); *Fleming* v. *Pearson*, 39 F. Supp. 300 (E. D. Tenn. 1941); *Doyle* v. *Johnson Bros.*, (N. Y. City Court, Kings City, 1941), 25 N. Y. S. (2d) 603, 28 N. Y. S. (2d) 452; *Williams* v. *General Mills*, 39 F. Supp. 849 (N. D. Ohio 1941); *Robinson* v. *La Rue*, 156 S. W. (2d) 432 (Tenn. Supreme Ct. 1941); *Fleming* v. *Swift*, 41 F. Supp. 825 (N. D. Ill. 1941); *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga. 1941); *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y. 1941).

[2] Thus for example in *Fleming* v. *Swift*, 41 F. Supp. 825, 832 (N. D. Ill. 1941) the court named the employees and stated "* * * all of which services * * * were rendered in the course of and in connection with and *necessary and incidental to the successful conduct of the defendant's business.*" Such employees were engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Act." (Italics supplied).

intent of Congress. It is not surprising therefore to find that none of the decisions applying the Act contains evidence that the court's attention was drawn to the legislative history which has been set forth above,[3] and which shows beyond question that Congress intended no all-inclusive scope to be given to the phrase "necessary to production".

Petitioner believes that the sounder doctrine is to be found in the decisions that have made clear their view that the Act was not intended to cover *all* employees of an interstate business. Thus, in *Carlton v. London Mines and Milling Company*, 4 W. & H. Rep., page 561 (Colo. Dist. Ct. Sept. 8, 1941), a state court held the Act not to apply to a weighmaster, although he was employed by a mining company engaged in the production of goods for interstate commerce. In so holding, the court disapproved the line of decisions that have held such employees as watchmen subject to the Act. Thus, it stated:

> "It would seem to be stretching a point to hold that a man whose sole contribution to production is the watching over goods falls under the definition of the Act. *If Congress had intended to attempt to include all employees it must be assumed the Act would have been so worded.* * * *."
>
> "To hold that he was, as expressed in the definition of the Act, 'employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof', is beyond the imaginative capacity of this court." (Italics supplied.)

A similar view of the plain meaning of the statute is contained in *Hart* v. *Gregory*, 16 S. E. (2d) 837 (North Carolina, Supreme Court, October 15, 1941). Here the Act was held not to apply to a night watchman, the Court stating:

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[3] See pages 55-58, *supra*.

> "We think it would be doing violence to the language of the Act to give it such elasticity as contended by plaintiff, that an ordinary night watchman came under the provisions of the Act. Our former decision did not so hold. There is a sharp conflict of decisions over the question, but whatever may be our sympathies we can only construe the law as written. None of the exceptions and assignments of error made by plaintiff can be sustained."

It has also not escaped the attention of some courts that there is a sharp distinction between activity "necessary to production" and activity necessary to the successful operation of a business. For example, in *Abadie* v. *Cudahy Packing Company*, 37 F. Supp. 164 (E. D. La. 1941), in holding the Act not to apply to a clerical worker, the court stated:

> "Even if it could be said that defendant was engaged in the production of goods for commerce because it 'handled or in any other manner worked on' the goods sold in interstate commerce, it would not follow that plaintiff was employed in an occupation necessary to the production thereof as there is no causal relationship between his occupation and production. Plaintiff's occupation may have been necessary in respect to defendant's business but his duties as ledger clerk were not so closely related to production as can be considered necessary thereto."

Although the courts have divided as to the applicability of the Act to maintenance employees of interstate employers, they have been unanimous (except for this case and *Fleming* v. *Arsenal Building Corporation*), in refusing to extend the Act to maintenance and service employees in the hire of an intrastate employer.

Most directly in point, of course, are the building employee cases. Thus, in *Killingbeck* v. *Garment Center*

Capital, Inc., 20 N. Y. Supp. (2d) 521, 259 App. Div. 691 (1940), the Court stated:

> "We would encounter insuperable difficulties however, and would distort the statute if we should apply it to employees of others than the manufacturer, having so remote and indirect a relation to the production of the goods as the watchman and the carpenter employed by a landlord a portion of whose premises have, perhaps fortuitously, been rented to tenants engaged in interstate commerce (New Amsterdam Casualty Co. *v.* State Industrial Commission, 80 Okla. 7; Rogers *v.* Glazer *et al.*, U. S. D. C., W. D., of Mo. Wage and Hour Reporter, April 22, 1940, page 158). Such employees are not engaged 'in any process or occupation necessary to the production' of goods destined for interstate commerce but in an occupation which may, perhaps, be necessary in the operation of a building wherein the goods are produced."

The opinion of the Ohio Court of Appeals in the case of *Cecil* v. *Gradison, supra,*[4] likewise states:

> "* * *. It is clear that the Act does not apply to employees of intra-state employers engaged to and actually performing intra-state acts, notwithstanding such intra-state acts incidentally facilitate the inter-state commerce or the production of goods for such commerce carried on by others with whom they are not otherwise related."

The Tennessee Supreme Court in *Robinson* v. *Mass. Mutual Life Insurance Company, supra,*[5] reached the same conclusion.

> "We are of opinion that plaintiff in error and those in whose behalf he sues are not engaged in interstate commerce or in the production of goods for commerce.

[4] Ohio Ct. of App. Nov. 17, 1941, printed in Petition p. 53.

[5] 158 S. W. (2d) 441 (1941).

We are wholly unable to relate the work in which plaintiff in error is engaged to the actual movement or flow of goods in interstate commerce. As we interpret the Act, it is limited to those employees who contribute directly to the production of goods for interstate commerce." • • •.

"Plaintiff in error and those for whom he sues are one step removed from the class of employees embraced in the Act. In a sense every individual whose activity in any way touches or affects the lives of those engaged in producing goods for interstate commerce contribute to such production, but we think Congress intended to limit the Act to those who directly contribute to the production of the goods." • • •.

Again, in *Merryfield* v. *Hoyt Shoe Corp. and R. F. C.*, 41 F. Supp. 794 (D. N. H. 1941), it was held that the mere fact that tenants of the building were manufacturing goods for interstate commerce was not sufficient to bring within the Act the employees of the building owner even though he was formerly a manufacturer. As the opinion states:

"The plaintiffs had nothing to do with the actual manufacture of goods but were in the employ of the owners of the real estate, first, the Hoyt Shoe Corp., and, second, the R. F. C. They are set out in the complaint as firemen, watchmen and maintenance men to look after the real estate, paid by the Shoe Corporation and later by the R. F. C." (41 F. Supp. 794, 795).

In reaching this conclusion the court considered it important that the Fair Labor Standards Act is not framed to include all employment "affecting commerce".

"The Fair Labor Standards Act is by its terms limited to employees engaged in interstate commerce,

or in the production of goods for interstate commerce and does not extend to employment that merely affects interstate commerce.

"In the case of Gerdert *v.* Certified Poultry & Egg Company, D. C., 38 F. Supp. 964, 969, it is said: 'The minimum wages and maximum hours provision of the Fair Labor Standards Act relates to employees who are engaged in interstate commerce or in the production of goods for commerce, but it is difficult to see how an employee could be engaged in commerce or in the production of goods for commerce, unless his employer were likewise engaged, because the employee is merely the agent of the employer. It would be necessary, therefore, to determine whether or not the employer was engaged in interstate commerce as distinguished from a practice or business adversely affecting interstate commerce.'

"I hold that employees of a landlord who is not himself engaged in the manufacture of goods for interstate commerce but whose premises are leased to others who are engaged in the production of goods for commerce do not come within the provisions of the Wages and Hours Law of the Fair Labor Standards Act" (41 F. Supp. at 795-796).

The remaining case involving the building-employee problem is *Johnson* v. *Filstow, Inc.*,[6] and is to the same effect.

The cases outside the building-employee field have likewise been unanimous in excluding maintenance, service and repair men of a non-interstate employer whenever the question has been presented.[7]

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[6] 5 W. & H. Rep. 286, F. Supp. (So. D. Fla. Mar. 30, 1942).

[7] *Farr* v. *Smith Det. Agency*, 38 F. Supp. 105, (N. D. Tex. 1941); *Pedersen* v. *Fitzgerald Construction Co.*, 262 (N. Y.) App. Div. 665 (1941); *Sybert* v. *Bradley*, 4 Wage & Hour Rep. 630, F. Supp. (S. D. Ill. 1941); *Cf.*, *Bowman* v. *Pace*, 119 F. (2d) 858 (C. C. A. 5th, 1941) and *David* v. *Boylans*, 34 F. Supp. 555 (E. D., La. 1940) where the same result seems clearly to have been assumed.

Only the decisions of the Second and Third Circuits stand opposed, but neither contains reasoning adequate to support its conclusion. The Third Circuit simply decided the issue by looking to a few words in Sections 6 and 7 and to the last part of the definition of production in Section 3 (j). The opinion omits analysis of related sections of the Act, of the relevant legislative history, and of the judicial authorities.

The Second Circuit based its decision upon the ground that the Petitioner should be treated as if it were actually engaged in the production of goods for interstate commerce. This reasoning also led to that Court's denial that the services rendered by Petitioner are rendered in intrastate commerce. The error of this reasoning is therefore pointed out hereafter in the discussion of the "service" exemption at pages 89-91.

(5) Conclusion.

Whatever else may be said concerning the cases upon which the Administrator relies, there has at least been a limiting factor implicit in their facts and often pointed out by the courts deciding them. This factor has been that the employees were in the hire of an interstate enterprise. It is submitted that this must be the outside limit of the extension of the Act to employees of the type here involved.

The Administrator, apparently recognizing that such is the case, has attempted to overcome this handicap by suggesting that the Petitioner somehow partakes of the character of an interstate enterprise.

Thus he has pointed out in his Brief in the Circuit Court of Appeals on several occasions that Petitioner formerly itself occupied and used the present loft building as a factory in which it produced men's clothing.[1] But the facts remain undisputed in the record that since 1928 Petitioner has done no manufacturing whatsoever

[1] Administrator's Brief, Circuit Court of Appeals, pp. 5, 12, 27, 39.

(R., p. 166); that its sole activity has been to operate the building as a landlord, leasing space to any person desiring it (R., p. 166); that it has no source of revenue and no business other than that which is connected with the ownership and leasing of its building (R., p. 166); and that it has no interest or connection whatsoever with the manufacturing or other activities of any of its present or past tenants (R., pp. 166-167, 175). The Act must be applied in the light of the facts as they exist, not as they existed ten or fifteen years ago. The previous occupation of the same building for manufacturing by the landlord was also a fact in *Merryfield et al.* v. *Hoyt Shoe Corporation, et al., supra,* but it had no effect upon the Court's decision.

The Administrator has further attempted to argue that Petitioner, being the owner and operator of a building having interstate tenants, cannot be engaged in a local enterprise because the whole building is itself one enterprise of several individual factories gathered together as a unit under one roof for mutual convenience and economic advantage. But this theory ignores the facts. Whereas the building, when operated as a factory by Petitioner fourteen years ago, might well have been characterized as an economic unit, this is no longer the case. Each of the tenants is engaged in a small independent enterprise, manufacturing different articles and shipping different percentages of those articles into interstate commerce. The element of contiguous operation of separate enterprises was present in every one of the building service cases already cited, and was in every case recognized for just what it is and not as creating some sort of mystical fusion. The Act affords no basis for coverage by buildings, but is always careful to refer to "employers" and "employees".

As we have shown above it is impossible to accept an interpretation of the phrase "process or occupation neces-

sary to production" that is taken wholly out of context and in disregard of the repeated expressions of Congressional intent not to push the coverage of the Act to the limits of constitutional power. This is true whether the word "necessary" be taken to mean "indispensable", or whether it be taken to mean "convenient and appropriate", to anything that is "suitable" for production, both of which definitions were sanctioned by the Third Circuit Court of Appeals.

Almost all activity anywhere in the United States can be properly termed indispensable to production for commerce or "convenient and appropriate" to something "suitable" to such production. Such unbounded scope was never intended by the legislators who framed and passed this Act. They deliberately refused to pass an act designed to cover all activity that might "affect" interstate commerce. They stated that not all employees even of an interstate employer were to be covered but only those who functioned in an immediate and direct sense in commerce or the production of goods for commerce. The Administrator has flouted this express wish of Congress by including everyone "on the payroll", even to maintenance, clerical and service employees. Congress meant to exclude some employees but if these latter groups are covered none will fall outside the Act.

When, as here, we are not even dealing with employees of an interstate employer the case should be clear beyond doubt. Petitioner is a wholly local enterprise devoted to the ownership and management of real property. And the question before this Court is whether Congress shall be taken to have intended to include its employees simply because they may be brought under a highly expansive interpretation of a phrase that constitutes an ancillary part of a statutory definition.

IV

PETITIONER'S ELEVATOR OPERATORS ARE NOT ENGAGED "IN COMMERCE."

As a secondary argument with regard to Petitioner's elevator operators, the Administrator has asserted that they are engaged "in commerce" within the meaning of the Act and this view was adopted by the Third Circuit in the instant case. This contention should be dismissed at the outset for the reason as stated earlier that the *employer* here is engaged neither in interstate commerce nor in the production of goods therefor.[1]

In any event the phrase "in commerce" was never intended by Congress to extend to employees of the type here presented.

The record clearly shows that Petitioner, through its elevator operators, merely supplies to its tenants the means of ingress and egress for them, their employees and customers, and for property being shipped to and by them (R., p. 176). Of the three operators, one carries only passengers (R., p. 45), and this person is not the subject of the Administrator's contention.[2] Furthermore, the two freight elevator operators engage in many diverse activities, all connected with the servicing of the building in addition to elevator operation. Thus, one such operator carries passengers daily during rush hours (R., p. 36); carries other passengers, machinery, and rubbish from the premises leased by two tenants (R., p. 41); and performs the regular duties of a watchman on Saturdays and Sundays (R., pp. 42, 43). The other operator likewise carries passengers; takes down most of the trash from the upper floors of the building; makes such trash up into bales to be disposed of; cleans the outside yard; and performs the duties of a watchman at various times (R., pp. 55-56, 58-59, 62).

[1] See pp. 16-49, *supra*.

[2] Thus the Administrator's Brief, Circuit Court of Appeals, p. 39, limits his contention to the operators of the freight elevators.

Furthermore, it is noteworthy that the freight elevator operators, even during such times as their cars carry goods coming to or from the premises of the tenants, do not in any way handle or touch or have custody of such goods which always remain in the custody of representatives of the tenants, or their employees, or of employees of carriers or transfer agencies (R., pp. 37, 47, 56, 57, 83, 85, 99, 100, 109, 110, 113, 120, 121, 129, 135, 138, 149, 158, 163).

Thus, the statement of the Court below that Petitioner's elevator operators are engaged "in commerce" within the meaning of the Act can only mean that the words "engaged in commerce" must be read as covering any employee whose work remotely "affects" commerce.

But the words "employee engaged in commerce" do not mean "employee in any manner affecting commerce" nor do they mean "any employee whose activities might constitutionally be reached by Congress", as the Administrator must be contending. Such unwarranted efforts to expand the meaning of a statute have been rejected by this Court only recently in cases involving the Sherman and the Federal Trade Commission Acts. *Apex* v. *Leader*, 310 U. S. 469 (1940); *Federal Trade Commission* v. *Bunte*, 312 U. S. 349 (1941).[3]

The reasoning of the *Apex* and *Bunte* cases applies even more strongly here where there is abundant evidence that Congress consciously rejected the idea of reaching all activity affecting commerce. If "in commerce" had been thought to include the full constitutional power of Congress, there would have been no need for adding the words "or in the production of goods for commerce". Moreover, the final form of the Act rejected the phrase "affecting commerce" which was familiar to Congress through the National Labor Relations Act as comprehending the broadest scope of possible Congressional power and which had appeared in earlier drafts of the Act. Thus, it would go contrary to clear Congressional

[3] See the discussion of these cases, *supra*, p. 14.

intent to give some novel and highly expanded meaning to the words "in commerce". In particular, precedents drawn from cases decided under the National Labor Relations Act are out of place.[4]

The Federal Employers' Liability Act[5] furnishes an additional and striking illustration of Congressional recognition of the distinction between "in" and "affecting" commerce. The Act until 1939 provided that railroads engaging in commerce should be liable to any person "suffering injury while he is employed by such carrier in such commerce". In 1939 Congress broadened the scope of the Act by specifically providing that any such employee whose duties "in any way directly or closely and substantially *affect* such commerce" should be considered as being entitled to the benefits of the Act.[6]

The cases arising under that Act prior to the 1939 amendment are of course highly apposite authorities for the construction of the Fair Labor Standards Act, dealing, as they do, with the relation of employee duties to interstate commerce.

Such cases indicate beyond question that Petitioner's elevator operators are not "engaged in commerce." Thus maintenance employees of all kinds were excluded even though they facilitated and serviced the instrumentalities of interstate commerce.[7] It was also squarely held that an elevator operator in a railroad office building did not come within the Act.[8]

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[4] See pp. 58-59, *supra*.

[5] Act of Apr. 22, 1908, 35 Stat. 65, 45 U. S. C. A. Sec. 51, *et seq.*

[6] Act of Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404, 45 U. S. C. A. Sec. 51.

[7] *Shanks* v. *D. L. & W. R. R. Co.*, 239 U. S. 556 (1916); *Chi. B. & Q. R. R. Co.*, v. *Harrington*, 241 U. S. 177 (1916); *Chi. & E. I. R. R. Co.*, v. *Ind. Comm.*, 284 U. S. 296 (1932); *Poff* v. *Washington Terminal Co.*, 69 F. (2d) 572 (App. D. C. 1934); *D. L. & W. R. R. Co.*, v. *Yurkonis*, 238 U. S. 439 (1915); *Robinson* v. *B. & O. R. R. Co.*, 237 U. S. 84 (1915); *Wells Fargo* v. *Taylor*, 254 U. S. 175 (1920); *Chi. R. I. & P. R. R.* v. *Bond*, 240 U. S. 449 (1916).

[8] *Southern R. R. Co.*, v. *Taylor*, 16 F. (2d) 517 (App. D. C. 1926), cert. denied 273 U. S. 767. Akin to this result are cases refusing in other connections to hold elevators to constitute a "common carrier." *Seaver* v. *Bradley*,

The cases under the Fair Labor Standards Act likewise indicate that Petitioner's elevator operators are not "in commerce". The precise contention here made by the Administrator was rejected by the Ohio Court of Appeals in the case of *Cecil* v. *Gradison, supra.* After a discussion of cases decided by this Court on the question of when interstate transactions begin and end, it was concluded that the elevator operators there involved "were performing intrastate acts preceding and following interstate transactions, and were not engaged in interstate commerce." That result was reached despite allegations admitted for purposes of the case, that the elevator operators were highly important in facilitating the movement of packages in interstate commerce. The other building service employee cases have likewise refused to hold elevator operators, or indeed any other maintenance employees, to be "in commerce".[9]

The all-inclusive view of the words "in commerce" advocated by the Administrator has also been rejected by the courts in cases other than those involving elevator operators. Thus local truck drivers and like employees who move goods brought in from without a state are not

179 Mass. 329, 60 N. E. 795 (1901), and *Mitchell* v. *N. Y. Life Ins. Co.*, 75 F. (2d) 107 (C. C. A. 7th 1934). The language of Mr. Chief Justice Holmes in *Seaver* v. *Bradley* is worth noting:

> "* * * manifestly it would be contrary to the ordinary usages of English speech to describe by such words the maintaining of an elevator as an inducement to tenants to occupy rooms which the defendant wished to let."

[9] Specifically holding elevator operators to be neither "in commerce" nor "engaged in production": *Merryfield* v. *Hoyt Shoe Corp.*, 41 F. Supp. 794 (1941). In *Killingbeck* v. *Garment Center*, 20 N. Y. Supp. (2d) 521, 259 App. Div. 691 (1940), the unsuccessful plaintiffs were a watchman and a carpenter. Elevator operators were mentioned among the other employees and the opinion of the court appears to apply equally to them. *Robinson* v. *Mass. Mut. Life Ins. Co.*, 158 S. W. (2d) 441 (1941), held the Act inapplicable to other maintenance employees and *Johnson* v. *Filstow, Inc.*, 5 W. & H. Rep. 286 (So. D. Fla. Mar. 30, 1942) held the Act inapplicable to a janitor.

within the Act.[10]. This result accords with Congressional intention.[11]

In fact Petitioner has been unable to find authority of any kind relevant to the interpretation of the words "in commerce" that would support the Administrator's contention that the elevator operators here should be brought within that category, with the exception of course of the opinion of the Court below. That opinion however treats the matter only by an *ex cathedra* statement contained in a footnote and supported by no reasoning or authority. The Second Circuit in the *Arsenal* case did not venture to express such a novel view and Judge Woolsey left no doubt of his disapproval when he decided the case in the District Court. He stated that the elevator operators, "if considered as engaged in any commerce, * * * were engaged in a vertical intrastate commerce and could not have been considered to have been engaged in interstate commerce in any proper sense."

In his brief in the Court below,[12] the Administrator cited a number of cases that have declared the activities there considered to be within interstate commerce. It is noteworthy that all of these cases involved activities integrally related to the functioning of organizations or

[10] *Rauhoff* v. *Gramling*, 42 F. Supp. 754 (E. D. Ark., 1941); *Gibson* v. *Glasgow*, 157 S. W. (2d) 814 (Tenn. Supreme Ct. 1942); *Cf.*, *Wagner* v. *United Dividend Corp.*, Colo. Dist. Ct. 5 W. & H. Rep. 138 (1942); *Porter* v. *Wilson*, 5 W. & H. Rep 152, F Supp. (No Dist Tex., 1942); *Veazey Drug Co.* v. *Fleming*, 5 W. & H. Rep. 60, F. Supp. (W D. Okla., 1941); *Contra*, where work is integrally related to the business of an interstate carrier, *Elam* v. *Wolberg*, Tenn. Chanc. Ct., 1942, 5 W. & H. Rep. 136; and *Tapp* v. *Price-Bass*, Tenn. Chanc. Ct., 1942, 5 W. & H. Rep. 155.

[11] See Hearings, p. 42, where this problem of local truckers is explicitly considered. Also to be noted is Congressional desire not to include persons who are fortuitously related to interstate commerce and would be within the scope of Congressional power. Thus, "For example, the policy in this regard is such that it is not even intended to include in its scope those purely local and small business establishments that happen to lie near State lines, and solely on account of such location, actually serve a wholly local community trade within two States." (Senate Report No. 884, July 8, 1937, explaining the bill reported to and passed by the Senate)

[12] Administrator's Brief in the Circuit Court of Appeals, at pp. 39-43.

instrumentalities engaged as carriers of interstate or foreign commerce. Most of them involve loading and unloading of goods in railroad freight yards;[13] on ocean-going vessels;[14] and in railroad passenger stations.[15] In all these cases great interstate carrying systems were involved.

The remaining cases,[16] involving carrier businesses designed for the sole purpose of taking custody of interstate goods and carrying them for hire for part of their journey, were cited to establish a proposition which no one disputes:

> "The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction."[17]

The contrast between such facts and those here involved could hardly be more striking. The elevators here in question are merely part of the service furnished by a

[13] *Union Stock Yard Co.* v. *U. S.*, 308 U. S. 213 (1939); *B. & O. S. W. R. R.* v. *Burtsch*, 263 U. S. 540 (1924); *Erie R. R.* v. *Shuart*, 250 U. S. 459 (1919).

[14] *Puget Sound Co.* v. *Tax Comm.*, 302 U. S. 90 (1937).

[15] The "red cap cases" under this Act: *Harrison* v. *Kansas City Terminal Ry. Co.*, 36 F. Supp. 434 (E. D. Mo., 1941); *Williams*, v. *Jacksonville Terminal Co.*, 35 F. Supp. 267, (D. C. Fla., 1940), affirmed on other grounds, 118 F. (2d) 324, affirmed by this Court March 2, 1942, 86 L. Ed. Adv. Ops. 598. *Pickett* v. *Union Terminal* was a companion case. It was stipulated by counsel that the "redcaps" were "in commerce" and the point was not discussed by the Court.

[16] *The Daniel Ball*, 10 Wall 557 (1870), steamship operating within a state on navigable water of the United States, carrying goods destined for another state. *Thompson* v. *Daugherty*, 40 F. Supp. 279, (D. C. Md., 1941); *Magann* v. *Long's Baggage Transfer Co.*, 39 F. Supp. 742, (W. D. Va., 1941); and *National Labor Relations Board* v. *Carroll*, 120 F. (2d) 457 (C. C. A. 1st 1941), applying the Fair Labor Standards Act and the National Labor Relations Act to *carriers of U. S. mail*, operating within a single city.

[17] Quoted by the Administrator in his Brief in the Circuit Court of Appeals at p. 40 from *The Daniel Ball*, 10 Wall 557. at p. 565.

landlord. In fact their operation is only one among various activities performed by the particular employees involved.

Since the elevators furnished by the Petitioner for the convenience of its tenants are merely the means whereby the tenants' goods are raised from the ground floor to other floors in the building, or *vice versa,* it could be argued with equal force that the stairway or fire escape, over which the tenants' goods might be carried, are instrumentalities of interstate commerce and that the janitor who sweeps the stairs is "in commerce". Obviously that is not the law. If the Administrator's contention is upheld, then every elevator operator in every building, whether he carries passengers or freight in his car, is likewise engaged in interstate commerce. There can be no distinction between carrying in an elevator a parcel which has arrived from another state, as in the present case, and carrying persons who have just arrived from another state or the United States mail carrier who is engaged in delivering letters which have arrived from outside the state.

V

PETITIONER IS EXEMPTED FROM THE WAGE AND HOUR PROVISIONS OF THE ACT AS A SERVICE ESTABLISHMENT, UNDER SECTION 13 (a) (2).

Even if this Court should conclude that, despite the grounds already advanced, the Act applies by its terms to the Petitioner's employees, they are nevertheless exempted from the wage and hour provisions of the Act by virtue of Section 13 (a) (2), which provides as follows:

> "The provisions of sections 6 and 7 shall not apply with respect to * * * any employee engaged in any * * * service establishment the greater part

of whose * * * servicing is in intrastate commerce; * * *."[1]

The only argument that has been advanced for holding Petitioner liable under the Act is the fact that it furnished certain services[2] to tenants of its building, a transaction which could hardly be more localized or intrastate in character. It is clear therefore that the Petitioner comes within the exemption, unless some unusually constricted meaning is to be placed upon its terms.

(1) The building service cases.

This was the view of Judge Woolsey in the District Court opinion in the case of *Fleming* v. *Arsenal Building Corporation and Spear & Company, Inc.*[3] There it was held, on facts substantially identical to those involved in the instant case, that Section 13 (a) (2) exempts from the provisions of Sections 6 and 7 of the Act the maintenance and service employees of a loft building, space in which is rented to tenants engaged in the manufacture of goods for interstate commerce. Judge Woolsey stated:[4]

> "It seems to me, however, although I am aware that a different view has been taken by Judge Kirkpatrick of the District Court, Eastern District of Pennsylvania, in the case of *Fleming* v. *A. B. Kirschbaum Company*, 38 F. Supp. 204, decided during the trial of this cause, that the real question in this cause is whether or not the facts show that the defendants are *'service establishments'* within the exception contained in Section 13 (a) (2) of the Fair Labor Standards Act of 1938.
>
> "This cause was tried with the utmost thoroughness. Five days were occupied in the trial. It seemed

[1] Section 13 (a) (2) speaks of "retail" as well as service establishments. That part of the provision has been omitted above to show more clearly the Petitioner's ground for invoking this subsection.

[2] See Statement, pp. 5-6, *supra*.

[3] 38 F. Supp. 207 (1941).

[4] 38 F. Supp. 207, 212 (1941).

> to me, as the trial progressed, that the Government had, in its attempt to tie up the employees of the defendants with *'production of goods for commerce'* proved beyond any peradventure that the defendants, Arsenal Building Corporation and Spear & Company, Inc., as its agent, were *'service establishments,'* all of whose servicing was in intrastate commerce, and I so find."

This decision was reversed by the Second Circuit; and the exemption has likewise been refused in the instant case by both the District Court and the Circuit Court. The reasoning of these three opinions, however, is in great confusion, and is not supported by other judicial authority.[6]

The District Court below conceded that Petitioner is engaged in servicing—

> "Unquestionably, most if not all of the work done by the employees in this case could be properly described as servicing."

But it nevertheless held that the Petitioner did not operate a "service *establishment*" because it was not primarily engaged in rendering service, but was primarily a landlord. Judge Kirkpatrick also suggested that perhaps Petitioner operates a manufacturing establishment instead of a service establishment (R., pp. 179-180).

The Circuit Court below approved the District Court's reasoning that Petitioner was primarily a landlord and therefore not a service establishment. It also, however,

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[5] 125 F. (2d) 278 (1941).

[6] These are the only building service cases dealing with the exemption. All other such cases have held the Act inapplicable, and have therefore not had to face the service exemption question. *Cecil* v. *Gradison, supra; Merryfield* v. *Hoyt Shoe Corp., supra; Killingbeck* v. *Garment Center Capital Inc., supra; Robinson* v. *Massachusetts Mutual Life Insurance Co., supra;* and *Johnson* v. *Filstow, Inc., supra.* The opinion in the *Cecil* case strongly suggested, however, that this exemption was applicable (see Petition for Writ of Certiorari, p. 58).

based its holding (and seemingly with greater assurance) upon the theory that to come within the service exemption, services must be of a retail nature and must therefore be sold to non-commercial users (R., pp. 220-222).

The Second Circuit in the *Arsenal* case left open the question whether a loft building operator ran a service establishment but denied the exemption on the ground that the servicing was not intrastate in character.[7]

The primary business test as laid down by Judge Kirkpatrick and approved by the Court below, *viz.*, that the Petitioner was primarily engaged in the leasing of space and thus not a service establishment, has no proper application in this case, however it may be elsewhere. In the first place, the premise is doubtful. The leasing of space itself is properly to be classed as the rendering of a service. Even the Administrator concedes this. In his Interpretative Bulletin No. 6,[8] he includes hotels and tourist houses among service establishments exempted from the Act.

Moreover, it is difficult, if not impossible, in practice ever to separate the rental of building space from the furnishing of maintenance service. In business buildings as well as in apartment houses, it is customary for a landlord to furnish maintenance and services of various sorts. To say that the space is more important than the other services is like saying that the length of a rectangle is more important than the width.

The second basis of the decision of the Circuit Court below was that servicing must be retail and that to be retail it must be furnished to non-commercial customers. In this connection the Court stated:[9]

> "In reaching our conclusion we have given weight to the fact that the exemption as to service establishments was added by the conference report to the

[7] *Fleming* v. *Arsenal Building Corporation*, 125 F. (2d) 278 (1941).

[8] 4 W. & H. Rep. 315, 318.

[9] R., p. 221.

exemption as to retail establishments already contained in subparagraph (2) of Section 13 (a) of the bill. From this it is fair to infer that the type of establishment meant is that which has the ordinary characteristics of a retail establishment except that it sells services instead of goods. In other words it is an establishment the principal activity of which is to furnish service to the consuming public."

The implied premise that Congress intended even the word "retail" to be limited to transactions with non-commercial consumers is of doubtful validity. An earlier form of Section 13 (a) (2) was limited to "retail" business but was apparently intended to include business done with commercial customers.[10]

We may put these preliminary objections to one side, however, for it would seem patent that Congress meant something other than retail when it used the additional word "service."

(2) The language of Section 13 (a) (2).

The language of Section 13 (a) (2) itself certainly suggests that "service" means something additional to "retail." The word hardly appears to be surplusage; and in fact it was deliberately added by the Conference Committee to a version that mentioned only "retail" business.

Yet the Administrator contends that Section 13 (a) (2) should be interpreted as if it had said simply "retail establishments" or perhaps "service and other retail establishments." It was pointed out by the Administrator and the Court below that some of the other exemptions of Section 13 involved industries that render serv-

[10] See discussion of the legislative history, p. 84, note 11, *infra*. Courts have rejected the supposed "non-commercial" limitation as to retail establishments. See pp. 85-86, *infra*.

ice. From this it was reasoned that Section 13 (a) (2) does not include services in general but only retail services. To this tenuous argument, two conclusive answers may be given. First, Congress knew how to say "retailing" when it meant only retailing. One need only look to Section 13 (a) (1), which exempts anyone employed in a "local retailing capacity." Secondly, no one would expect a long list of exemptions to be mutually exclusive categories. Here again, one may compare Section 13 (a) (1) and 13 (a) (2).[1] Congress was fully aware that in many instances exemptions would overlap.[2]

The root of the Administrator's error is his failure to recognize the underlying purpose of Section 13 (a) (2). He has seen "retail" and "service" grouped together in the same statutory clause. He has guessed that they have something in common. They do indeed. But the common denominator is not reached by cancelling out one of the terms. Rather it is found in the common modifying clause, "the greater part of whose sales or servicing is in intrastate commerce." The exemption, in other words, was intended to cover predominantly *local* business. This is made clear by a consideration of the relevant legislative history.

(3) The legislative history of Section 13 (a) (2).

The explicit exemption did not appear until near the close of the year of Congressional deliberation of the Act. But from the very inception of the legislation, great concern was expressed that the Act, for constitutional as well as other reasons, should not extend to retail and

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[1] Indeed Section 13 (a) (2) itself was inserted in the Act only to ensure a result which was thought by many to follow from the general provisions of the Act. See pp. 81-85, *infra*.

[2] See for example statement in the House of Committee Chairman Norton: 83 Cong. Rec., p. 9257:

> "These general exemptions, to a certain extent overlap the specific exemptions, and so there can be no question but that all meritorious cases are covered in some cases twice."

other predominantly local businesses. The concern not to touch local business may be found even in the President's message to Congress on May 24, 1937, which initiated consideration of legislation for governmental control over minimum wages and maximum hours of employment. In that message[1] the President stated:

> "Although a goodly portion of the goods of American industry move in interstate commerce and will be covered by the legislation which we recommend, there are *many purely local pursuits and services* which no Federal legislation can effectively cover." (Italics supplied.)

At the outset of the Joint Hearings on the first draft bills, it was explained by the Honorable Robert H. Jackson, then Assistant Attorney General, that there was no intention to reach service and other local businesses:

> "* * * generally speaking the policy of the bill is not to include the service trades *and* small businesses *and* the retail enterprises."[2] (Italics supplied.)

To emphasize this point, Mr. Jackson added that the purpose of the legislation was to leave

> "to the State and local communities themselves the power of regulating the small business units that affected the local community only."[3]

Congressional leaders were keenly interested in this aspect of the proposed bill, and it was necessary for Mr. Jackson to repeat this assurance several times:

> "* * * but, as I said at the outset under Senator Black's question, it is not intended by this bill to.

[1] Quoted in the Report of the Senate Committee on Education and Labor to accompany S. 2475, 75th Cong., 1st Sess., Senate Cal. No. 905, Report No. 884.

[2] Hearings, p. 35.

[3] Hearings, pp. 35, 36.

affect the retail trades or the service trades. It is intended to catch the unfair labor practices at the point of production."[4]

The matter was carefully discussed in the report of the Senate Committee on Education and Labor which accompanied and recommended passage of S. 2475, as amended.[5] That report stated:[6]

"The bill carefully excludes from its scope *business* in the several States that is *of a purely local nature*. It applies only to the industrial and business activities of the Nation insofar as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce. *It leaves to State and local communities their own responsibilities concerning those local service and other business trades that do not substantially influence the stream of interstate commerce.* For example, the policy in this regard is such that it is not even intended to include in its scope those purely local and small business establishments that happen to lie near State lines, and solely on account of such location, actually serve a wholly local community trade within two States." (Italics supplied.)

On July 27, 1937, Senator Black in his capacity as Chairman of the Committee on Education and Labor of the Senate, discussed the proposed Senate bill by outlining its provisions in general. At the outset he made clear that there was no intention of regulating local business units. He said:[7]

"The general purpose of the bill legislatively speaking, is a three fold one:

[4] Hearings, pp. 39, 40. Senator Black (now Mr. Justice Black), was then Chairman of the Senate Committee in charge of the bill.

[5] This bill passed the Senate on July 31, 1937.

[6] Senate Report No. 884, 75th Cong., 1st Sess., p. 5.

[7] 81 Cong. Rec., p. 7648.

"It provides a method of obtaining the objectives of minimum wages and maximum hours in industries throughout the Nation which engage in the transportation of *their* goods in interstate commerce. It is not intended to, and does not, attempt to provide by Federal legislation the fixing of minimum wages and maximum hours of employment in all the varied *peculiarly local business units* of the Nation." (Italics supplied.)

This same idea was reiterated and emphasized a few paragraphs later, where he said:[7]

"So the bill, insofar as it relates to maximum hours of employment and minimum wages, is limited, except to the small extent I have heretofore indicated, to goods which are actually manufactured for transportation and are transported in interstate commerce. We therefore eliminate in the beginning any idea that this is an effort to regulate wages and hours *in the various service employments* throughout the Nation.

"That is done for two reasons. In the first place, the bill rests squarely upon the interstate commerce clause of the Constitution. In the second place, I believe it was the prevailing sentiment of the committee, if not the unanimous sentiment of the committee, *that businesses of a purely local type which serve a particular local community,* and which do not send their products into the stream of interstate commerce, can be better regulated by the laws of the communities and of the States in which the business units operate." (Italics supplied.)

Neither the original bills nor that passed by the Senate[8] contained an express exemption for local business, however. Such an explicit provision appeared for the first

[7] 81 Cong. Rec., p. 7648.

[8] S. 2475 as passed by the Senate July 31, 1937.

time in the bill passed by the House,[9] which saved from the coverage of the Act "any retail industry the greater part of whose sales is in intrastate commerce." This proviso was written into the House bill as the result of an amendment proposed by Representative Celler from the floor of the House on May 24, 1938.

While this amendment was accepted almost immediately, the reason for its ready acceptance in the House bill and later, in expanded form, in the Conference bill is not far to seek. The explanation undoubtedly is to be found in the case of *Santa Cruz Fruit Packing Company* v. *National Labor Relations Board*, 303 U. S. 453, decided March 28, 1938, approximately two months before the House amendment was offered. It will be recalled that that case decided for the first time that the commerce power of Congress might attach to an employer less than 50% of whose business involved interstate commerce. Thus, there was reason to make explicit the policy of the Act that it should not apply to businesses "the greater part" of whose activities are intrastate. It might be presumed that a Congress highly conscious of the constitutional issues raised by the Act would be aware of a case so important as the *Santa Cruz* case, but presumption is unnecessary. The record discloses discussion of the case on the floor of both the House and Senate.[10]

It is clear enough that Representative Celler was primarily interested in safeguarding retail business; and his amendment was limited to "retail industry."[11]

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[9] S. 2475 as passed by the House May 24, 1938.

[10] In the House, in the discussion on May 24, 1938, immediately preceding passage of the Celler amendment. 83 Cong. Rec. at pp. 7334 and 7384. The Celler amendment appears at pp. 7437-38. Representative Celler gave as his view, based on many years experience at the bar, that the (then) latest Supreme Court cases would bring retailing within the commerce power. The *Santa Cruz* case was also brought to the Senate's attention during discussion of the Conference Report, June 14, 1938. 83 Cong. Rec., p. 9173.

[11] Representative Celler apparently intended the word "retail" to cover a great deal more than is conceded by the Administrator, however. His amendment, even in this narrower form, was supposed to make clear the exemp-

The Conference Committee broadened the exemption into its present form. The change was not left to go unnoticed. The report of the Conference bill given the House by its conferees gave this explanation:[12]

> "Section 13 of the conference agreement contains the same exemptions as were contained in the House amendment with the following *changes and additions:* (1) It includes an exemption from both the wage and hour provisions of employees of retail or service establishments the greater part of whose business is in intrastate commerce, * * *." (Italics supplied.)

In the light of this explanation of the change from the House version, the conclusion of the Third Circuit that the "service" referred to in Section 13 (a) (2) must be retail in character seems hardly tenable.

(4) Judicial authority.

Although the Administrator's position receives support in scattered *dicta* in a few cases, Petitioner has been unable to discover any cases aside from the one at bar where the exemption has actually been denied on the ground that the services were for non-commercial customers. In fact, it has been held that even in the case of a *retail* establishment the exemption applies notwithstanding the fact that the customers are commercial consumers.

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tion from the Act, *inter alia*, of local sales, even if furnished to commercial consumers. He mentioned building contractors "doing a purely local business" as among those he wished to cover by his amendment. 83 Cong. Rec. 7394, May 24, 1938. Even before the Celler amendment was adopted, it was understood that the bill would not touch local industry. Thus, it was stated by Representative Kitchens shortly before the passage of the Celler Amendment that:

> "In fact, the bill excludes every worker in intrastate business of all kinds, such as work in laundries and other local factories and business not doing an interstate business." 83 Cong. Rec. p. 7412, May 24, 1938.

[12] Conference Report to accompany S. 2475, H. R., 75th Cong., 3rd Sess., Report No. 2738, p. 32.

Thus, in *White Motor Company* v. *Littleton,* 124 F. (2d) 92 (1941), the Court stated:

> "The character of the sale is not altered by the use to which the consumer may put the purchased commodity. These sales were preponderantly retail although the products sold were used subsequently for commercial purposes."

And in *Super-Cold Southwest Co.* v. *McBride,* 124 F. (2d) 90 (C. C. A. 5th, 1941), the Court, although holding the exemption inapplicable on the facts presented, left no doubt of its disapproval of the Administrator's contention. Thus, it stated:

> "The Act is unambiguous and operates to exempt all those coming within its terms and those terms cannot be enlarged or diminished by rulings of the administrator, such as that, because sales are made to commercial instead of to private users they are not sales at retail.
>
> "If therefore defendant were otherwise a retail dealer, we should hold it exempt though the retail sales were made to commercial rather than to private users."

Similarly the courts have applied the exemption to those who service commercial customers. In fact the most recent decision involving the service exemption was just such a case, viz., *Beatty* v. *Foutz Tool Co.,* F. Supp. , 5 W. & H. Rep. 259 (S. D. Cal. Mar. 23, 1942), involving a machine shop.

The only cases cited by the Administrator in his Brief in the Circuit Court wherein the exemption was refused involved employers engaged in the manufacture or production of goods.[1] It is not surprising therefore that the

[1] Thus, the Administrator in his Brief in the Circuit Court of Appeals at p. 49, cited *Wood* v. *Central Sand & Gravel Co.,* 33 F. Supp. 40 (W. D. Tenn. 1940); *Muldowney* v. *Seaberg Elevator Co.,* 39 F. Supp. 275 (E. D. N. Y. 1941); *Fleming* v. *Tidewater Optical Co.,* 35 F. Supp. 1015 (E. D. Va. 1940);

Administrator has attempted to demonstrate that the Petitioner operates "an establishment devoted to manufacturing." In order to reach this result, the Administrator has had to make the astonishing contention that the word "establishment" refers not to a business enterprise but to a physical structure. Thus, he asserted in his Brief in the Circuit Court that:[2]

> "Kirschbaum's employees do not work in a 'service establishment'; they work in an establishment devoted to manufacturing."[3]

The words of the Act clearly preclude such a construction. By the word "establishment," Congress intended to refer to a business unit, not a physical structure. It is only a business unit, and certainly not a building itself, that can engage in "servicing" or "selling."

Even the Administrator himself in his Interpretative Bulletin No. 6, repeatedly uses the word "enterprise" as equivalent to "establishment."[4] In fact he concedes that independent ownership of a particular business unit will usually be the determining consideration in ascertain-

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and *Boyhan* v. *Liden Manufacturing Co.*, 4 W. & H. Rep. 158 (C. C. Mich. Ingham Co. 1941). The Administrator also cited *Stucker* v. *Roselle*, 37 F. Supp. 864 (W. D. Ky. 1941), involving a hat cleaning establishment, and *Labates* v. *Interstate Co.*, 4 W. & H. Rep. 91 (W. D. Tenn. 1941), involving a restaurant, both of which held that the exemption applied.

[2] Administrator's Brief in the Circuit Court of Appeals, p. 50.

[3] At p. 50 in his Brief in the District Court he stated:

> "Since defendant's building is devoted exclusively to manufacturing activities, it is a manufacturing establishment".

[4] Thus, for example, in Interpretative Bulletin No. 6 issued December 7, 1938, and revised June 16, 1941 (4 W. & H. Rep. 315, 319, 320), the Administrator states: "A determination of the meaning of the word 'establishment' in Section 13 (a) (2) is necessary not only in order to decide whether an *enterprise*, or portion thereof, is within the exemption but also to ascertain whether the provision of the exemption, requiring that the greater part of the selling or servicing of an establishment be in intrastate commerce, has been satisfied." (Italics supplied).

ing whether it is a retail or service "establishment." Thus he states:[5]

> "The unit store will ordinarily constitute the retail or service 'establishment' contemplated by the exemption, even though it may be operated as a concession in a hotel, railroad station, or general market. In such cases, the structure of the enterprise is relatively simple and *the independent ownership of the particular store or shop will usually be the determining consideration.*" (Italics supplied.)

In support of his contention that the Petitioner is engaged in a manufacturing enterprise, the Administrator cited the case of *Barfoot* v. *White Star Line*, 170 Mich. 349.[6] A more inapposite precedent could hardly be supplied. That case involved a statute imposing a duty on the owner, agent or lessee to install elevator safety gates in any "manufacturing establishment, work shop, hotel or store." From the wording of the statute as well as its objective, it is obvious that the Michigan legislature was referring only to the physical place in which the installation was to be made. And the Michigan Supreme Court, in deciding the case, was careful to indicate that its construction of the word "establishment" was influenced by this fact rather than any general definition of the word. Thus the Court stated that it construed "the words 'manufacturing establishment' as meaning, *in the particular section we are considering*, premises in or on which a manufacturing business is conducted." (Italics supplied.)

If there be any doubt as to whether the Petitioner engages in manufacturing or any need to determine that fact by reference to judicial authority, the question is decided in the negative in *Commonwealth* v. *Arrott Mills Co.*, 145 Pa. 9 (1891). In that case the defendant corpora-

[5] Interpretative Bulletin No. 6, 4 W. & H. Rep. 315, 320.

[6] Brief in the Circuit Court of Appeals, p. 50.

tion owned buildings in the City of Philadelphia which it leased to persons engaged in manufacturing. In each building it operated a steam engine and boilers which were connected with a system of shafting, running into the rooms used by the tenants for manufacturing. The lower court decided that the defendant was not engaged in manufacturing, stating that so far as the defendant was concerned its transaction with regard to steam was closed when it sold the space and steam to others and received its price therefor, all of which was before actual manufacturing began.[7] "Here, one person owns merely the building, engine and shafting; another owns the raw material, the machinery directly employed in production, the finished product, the profits, and the good-will. If the former is engaged in manufacturing, in the same sense as is the latter, so is any landlord who rents a building in which manufacturing is carried on by his tenant, and so is any person who sells coal for the manufacturer's engine, or raw material for any state of the process." This conclusion was upheld by the Pennsylvania Supreme Court, which reiterated that defendant was merely a landlord supplying its tenants with steam power in order to rent its buildings. "It is not a manufacturer or producer of anything * * *"

(5) Petitioner's servicing is unquestionably in intrastate commerce and the exemption should be given effect.

It would be hard to imagine an activity which should more surely be characterized as intrastate than the servicing which is supplied by the Petitioner. In the opinion in the District Court in this case, Judge Kirkpatrick conceded: "* * * that renting buildings, the industry in which this employer is engaged, is not an 'industry en-

[7] The categorization of defendant's business in the *Arrott Mills* case, is apposite to the instant case; for there, as here, the statute involved was based upon economic function (tax statute) rather than physical operations (safety statute in *Barfoot* case, *supra*).

gaged in commerce or in the production of goods for commerce' ".[1] And in the District Court opinion in the *Arsenal* case, Judge Woolsey stated that: "It is difficult, if not impossible, to imagine a more localized employment than the maintenance and operation of a loft or office building."[2]

There is no suggestion in the opinions either of the District Court below or of the Third Circuit, nor indeed even in the briefs for the Administrator in either Court, that the servicing of Petitioner would not satisfy the requirement of Section 13 (a) (2) as to being intrastate. It is only in the light of the astonishing conclusion of the Second Circuit Court in the *Arsenal* case that it is necessary to rebut such a view. The entire reasoning of the Second Circuit on this point is to be found in the two succeeding sentences:[3]

> "It cannot be that if the exemption extends beyond retail 'servicing', it is the character of the 'servicing' itself that counts, divorced from the 'production' of which it is a part. Again, we should be met by the anomaly arising from such an interpretation, the capricious incidence of the act resulting from the accident of the industrial division of the whole process."

In other words, any activities separately conducted which *might* be performed by one large industrial corporation will be treated as if they actually were so performed. It does not require extended analysis to see that this reasoning would not only eliminate the service exemption of the Act:[4] It would also do away with all

[1] R., p. 178.

[2] 38 F. Supp. 207, 212.

[3] 125 F. (2d) 278, 280.

[4] It should also be noted that the Second Circuit is saying that if services are "necessary to production" they are automatically removed from the sphere of the exemption of Section 13 (a) (2). It is obvious, of course, that the exemption in such a case becomes meaningless.

limitations upon the coverage of the Act and indeed with all limitations upon Congressional power under the Commerce clause. One can hardly conceive of any activity, however small or however localized, which could not be performed by some huge interstate corporation. Thus the reasoning of the Second Circuit like that of the Courts below must be rejected and Section 13 (a) (2) should be applied as its language and legislative history require.

The Circuit Court below apparently realized that it was really adopting an abnormal and highly constricted interpretation of Section 13 (a) (2). Such an interpretation it sought to justify on the ground that that subsection "* * * represents a special exception to the general coverage of the Act" (R., p. 221). The examination of the actual legislative history, however, has shown that the retail and service exemption was not of this nature. It was no "special exception." It was included to make absolutely certain that a fundamental purpose of Congress should be achieved; that is, that predominantly local activities should not be included in the Act. Thus, if any canon of construction is indicated it should be a broad one, sympathetic to Congressional intention not to touch local activities.

The courts have been careful to point out the danger of disregarding this Congressional purpose. Thus in *Collins* v. *Kidd*, 38 F. Supp. 634 (E. D. Tex., May 1, 1941), the exemption was applied to a retail establishment operating an ice business despite the fact that the retailer manufactured the ice. In so holding, the Court emphasized the necessity of giving effect to Congressional intention that enumerated areas be exempt from the Act. It stated:

> "There is no way of rendering a law unpopular and causing it to be repealed or modified so readily as to extend its purpose beyond the scope of those to whom it was originally intended to apply. To

make a law unreasonable is to make it unpopular, and to make it unpopular is to destroy it. In the very interest of those concerned with the preservation and development of the Fair Labor Standards Act, we can see but one solution, and that is to hold that retailers and agricultural employees and others mentioned in the exemption must be exempt as the Act so provides."

The mere fact that the Administrator has taken a particular position in an Interpretative Bulletin is of course not conclusive.[5] He has no power to define the meaning of terms used in Section 13 (a) (2) as he does under Section 13 (a) (1) which exempts employees engaged in a "local retailing capacity." As stated by the Court in *Duncan* v. *Montgomery-Ward*, 42 F. Supp. 879, 883 (S. D. Tex., Dec. 16, 1941):

"Due deference should, of course, be paid by the Courts to the Rulings of the Administrator, but where, as here, the words of the Congress and the provision of the Act defining a retail establishment are clear, plain, and unambiguous, such provisions should not be enlarged or diminished either by the Rulings of the Administrator or the Court."

Moreover, the Administrator has estopped himself from any claim to respect for his opinion that any particular situation is covered by the Act, for he has admitted that he resolves all doubts in favor of coverage.[6] Thus, where the Administrator interprets the law *not* to apply, his opinion is presumptively correct. But where he interprets the law as applicable little or no weight should be given his opinion as such.

[5] See also *Super-Cold Southwest Co.* v. *McBride*, *supra*, p. 86.

[6] See Interpretative Bulletin No. 1 (W. & H. Manual 1941, p. 28).

The real nature of the interpretations issued by the Administrator was clearly perceived in the case of *Womack* v. *Consolidated Timber Co.*, F. Supp. , 5 W. & H. Rep. 10 (D. Ore. 1941). The Court's language, in upholding the exemption on the facts there presented, is highly illuminating:

> "Influenced by such considerations, the Administrator has previously taken an opposite position. During the pendency of this case and owing apparently to developments in this controversy, the former ruling was repudiated, notwithstanding the fact that certain courts had made the previous pronouncement the basis for decision, Labates *v.* The Interstate Company [1941 W. H. Manual 624], opinion January 29, 1941, Western District Tennessee, Western Division.
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> * * *
>
> "In the nature of things the administrative agency is impressed with the remedial nature of the Act and the urge to carry out the general purpose of Congress. On the other hand, the court is of opinion that exemptions wisely placed in such legislation should be enforced for the protection of the public at large against bureaucratic regulations of matters entirely local in character, such as the purveying of food, to the end that conditions such as those denounced in *Schechter* v. *United States*, 295 U. S. 495, shall not again prevail."

These cases support the view of Petitioner that the plain meaning and purpose of Section 13 (a) (2) should not be frustrated by the interpretation of an over-zealous administrator. There is no occasion to cloud the meaning of the Act with strained ambiguities and then to resolve them with unjustified presumptions. In short, Petitioner fulfills the terms of the exemption extended by Congress to service establishments and should be recognized as such by this Court.

VI

IF THE ACT BE HELD APPLICABLE TO PETITIONER'S MAINTENANCE AND SERVICE EMPLOYEES, IT WOULD CONTRAVENE THE 10TH AMENDMENT TO THE CONSTITUTION.

In sustaining the validity of the Act, this Court, in the case of *United States* v. *F. W. Darby Lumber Company*, 312 U. S. 100 (1941), upheld the power of Congress to prohibit the shipment in interstate commerce of goods produced under substandard labor conditions.[1] It was held that as a means reasonably adapted to the attainment of that end, Congress might directly regulate the wages and hours of employees actually engaged in the production of goods for such commerce where their employer is himself engaged in the production for and shipment in interstate commerce of such goods.

It is noteworthy that nowhere in the Court's opinion is there to be found any suggestion that the intrastate activities which are regulated may have anything less than a real and substantial effect upon interstate commerce. On the contrary, this Court repeatedly noted in its opinion that it was applying the Act to "*an employer engaged* * * * *in the manufacture and shipment of goods* in filling orders of extrastate customers * * *";[2] to the actual "*production of goods*, which, at the time of production, the *employer* * * * intends or expects to move in interstate commerce * * *";[3] and to "*one who employs persons* * * * to work on goods which *he* ships or expects to ship across state lines * * *."[4] On the facts there presented, involving the application of the Act to such an employer, a proper exercise of the power to "regulate intrastate activities

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[1] Section 15 (a) (1) of the Act.

[2] *United States* v. *F. W. Darby Lumber Co.*, 312 U. S. 100 at p. 117.

[3] *Id.* at p. 118.

[4] *Id.* at pp. 125-126 (Italics supplied throughout).

where they have a *substantial effect* on interstate commerce'"[5] was found to exist.

Such an application of the Act therefore clearly falls within the proper limits of the commerce power as they have been expressed in the very cases which were considered by Congress to supply the chief legal basis for the Fair Labor Standards Act. Thus in *National Labor Relations Board* v. *Jones and Laughlin Steel Corporation*, 301 U. S. 1 (1937), this Court stated:

> "Although activities may be intrastate in character when separately considered, if they have such a *close and substantial relation* to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. *Schechter Corporation* v. *United States*, *supra*. *Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. Id.* The question is necessarily one of degree." (Italics supplied.)

And likewise in *Santa Cruz Fruit Packing Company* v. *National Labor Relations Board*, 303 U. S. 453, 466-467 (1938), it was said:

> "It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a *close and substantial relation* to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this

[5] *Id.* at p. 119 (Italics supplied).

principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce', and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. *Schechter Corporation* v. *United States*, 295 U. S. 495, 546. *'Activities local in their immediacy do* not because interstate and national because of *distant repercussions.' Id.*, p. 554." (Italics supplied.)

The present case must be strongly contrasted with the facts brought before this Court in the *Darby* case, and Petitioner contends that here, where the employer is *not* engaged in production and the employees render services which at most can only be considered as indirectly affecting the production of goods by a third person, a construction holding the Act applicable would transgress the Tenth Amendment, which reserves to the states the powers not delegated to the Federal Government.[6]

Even the cases decided after the passage of the Fair Labor Standards Act, which have involved the power of Congress to regulate intrastate activities, do not justify an application of the Act to the Petitioner in the case now presented. Two cases in particular should be noted, as representing the limits of authority to which the Administrator may look for comfort in an effort to sustain his novel position.

In *Consolidated Edison Company of New York, Inc., et al.* v. *N. L. R. B.*, 305 U. S. 197 (1938), it was held that the National Labor Relations Act could constitutionally extend to an industry, which, viewed apart, was wholly intrastate and all of whose sales were of that

[6] Petitioner does not, and did not in the Court below, contend that the Tenth Amendment is more than the explicit statement of what was already implied by a constitution of delegated powers. This Court made that clear in its opinion in the case of *United States* v. *Darby Lumber Company*, *supra*.

character. However, merely to note the facts that were enumerated in the opinion of the Court to tie the Consolidated Edison Company to interstate commerce is sufficient to distinguish that case from the one here presented. The Court noted in detail the almost complete dependence upon the Company of the most important instrumentalities of interstate commerce and even of the Federal Government itself in the New York metropolitan area.

In *N. L. R. B.* v. *Benjamin Fainblatt, et al.*, 306 U. S. 601 (1939), the National Labor Relations Act was held applicable to a manufacturer who produced goods which were shipped in interstate commerce. Since interstate commerce was involved in the transportation of the goods across state lines directly to and from the manufacturer's plant; and since it was found that the manufacturer's unfair labor practices directly led or would lead to labor disputes interfering with the free flow of that commerce, the Court held that it was within the power of Congress to protect such commerce from interruption by prohibiting the practices complained of.

In both the *Consolidated Edison* case and the *Fainblatt* case, it clearly appeared that the intrastate activities of the companies involved had such a close, direct and substantial relation to interstate commerce that an interruption of those activities would immediately affect such commerce. In those cases, the permitted end was the prevention of activities which stopped or tended to stop the flow of interstate commerce. The constitutionality of the wage and hour provisions of the Fair Labor Standards Act was not, however, upheld on the theory that Congress was attempting to prevent activities which caused a stoppage of commerce; but on the ground that the fixing of wages and hours of employees directly functioning in the production of goods for interstate commerce for an employer so engaged, was a reasonable means of attaining the permitted end, *viz.*, the prohibition of shipment in interstate commerce of goods produced under sub-standard labor conditions.

It is quite another thing, however, to say that a reasonable means to prohibit or stop shipment of goods in interstate commerce is the regulation of wages and hours of employees of an employer who is not engaged in such production or shipment and whose connection with interstate commerce is indirect to say the least. This the Administrator disregards. He appears to believe that he need only point to *some* connection, however tenuous, between interstate commerce and the employees he wishes to bring within his view of the Act.

The Administrator has even attempted to take the position that since the Act was upheld in the *Darby* case as a valid exercise of the commerce power, no question of a conflict with the Tenth Amendment can possibly arise. His contention is that since the *Darby* decision the only possible field left for inquiry and determination, no matter what the facts may be, is one of statutory construction.[7] But that the Act was upheld on the facts then presented to this Court does not mean that Constitutional questions respecting all possible applications of the legislation are automatically eliminated. This Court surely did not mean in the *Darby* case that any interpretation given to the words "engaged in the production of goods for commerce" by the Administrator or by a state or lower federal court would be constitutional.

As has already been indicated,[8] Constitutional considerations should be viewed primarily as an additional and compelling reason for adopting a construction placing Petitioner and its employees beyond the scope of the Act.[9] Congress did not intend to apply the Act beyond the limitation of its power under the commerce clause, and the construction advocated by Petitioner is thus the only one consistent with the basic intent of Congress in enacting the

[7] Administrator's Brief in the Circuit Court of Appeals, p. 52.

[8] Pp. 12-13, *supra*.

[9] Thus, these considerations were the primary basis for the adoption of such a construction by the Court in *Cecil et al., v. Gradison et al.*, p. 10, *supra*.

legislation. As has been stated by the District Court for the Western District of Tennessee in *Chapman* v. *Home Ice Company*, F. Supp. , 5 W. & H. Rep. 133 (W. D. Tenn., 1942):

> "If we are to preserve the identity of the State with reference to commerce, the line must be drawn as it was by the draftsmen of this Act and those things which only indirectly or remotely affect commerce must be considered and recognized as such. Congress has broad powers with reference to commerce and the right to limit strictly intrastate or local activities under certain conditions, but in doing so it cannot violate the Tenth Amendment to the Constitution which reserves to the States the power to regulate internal commerce, and it has not attempted to do so in the Act now under consideration. Congress has not sought here to invade the province of the States in the regulation of wages and hours under the Fair Labor Standards Act so as to take in indiscriminately local activities of the people * * *."[10]

This Court, in sustaining statutes that have gone to the very verge of the Constitution, has repeated over and over again that the subject-matter of Congressional power is still commerce, not manufacture nor production. Thus, in the *Darby* case, the Chief Justice noted that "manufacture is not of itself interstate commerce."

It is submitted that the Administrator and the Court below have ignored the warning so plainly given by this Court. They have read the Constitution as if it gave Congress the power to do all things necessary and proper to the regulation of "production." And this is not merely the conclusion we draw from the holding of the Circuit Court. It is a conclusion dictated by the plain

[10] See also *Veazey Drug Co.* v. *Fleming*, 42 F. Supp. 689 (W. D. Okla., 1941); and *Fleming* v. *Peoples Packing Co., Inc.*, 42 F. Supp. 868 (W. D. Okla., 1942).

words of its opinion. It was enough to satisfy that Court that the employee services appeared "*convenient and appropriate*" to the maintenance of a something "*suitable*" for the manufacture of goods for commerce. (Italics supplied.)

The fundamental error of the Court below thus stands clearly revealed. It has assumed that the word "commerce" in Article I, Section 8, Clause 3 of the Constitution is equivalent to the word "production." It therefore held valid the application of the Act to Petitioner's employees because they were deemed necessary and proper to production.

We do not believe, as we have stated earlier, that Congress intended the word "necessary" in Section 3(j) of the Act to be interpreted as if it were a part of the general enabling clause of the Federal Constitution. But if such a construction cannot be avoided, we submit that this Court should declare to Congress that it has transcended its power under the Constitution.

CONCLUSION.

It is therefore respectfully submitted, for the reasons above set forth, that the judgment of the Circuit Court of Appeals for the Third Circuit be reversed.

Respectfully submitted;

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APRIL 15, 1942.

APPENDIX.

[PUBLIC—No. 718—75TH CONGRESS]

[CHAPTER 676—3D SESSION]

[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetrate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying

that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.

ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In

the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representatives may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reason-

able per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in deter-

mining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands.[1]

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.[1]

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (e).[1]

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board,

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible

without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such

classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after

such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be con-

clusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provisions of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

CHILD LABOR PROVISIONS

SEC. 12 (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under sec-

tion 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

EXEMPTIONS

SEC. 13 (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propogating, processing, marketing, freezing, canning, curing, storing or distributing the above products or byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions

contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.[1]

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental de-

[1] Amendment provided by Act of August 9, 1939 (Public No. 344, 76th Congress. 53 Stat. 1266).

ficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section

or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

INJUNCTION PROCEEDINGS

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

RELATION TO OTHER LAWS

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not

Approved, June 25, 1938.